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Abstract

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

February Term, A. D. 1943

Term No. 42011

Agenda No. 24

ELLA FREEMAN,

Plaintiff-Appellee,

vs.

THE LEADER MERCANTILE COM-
PANY, A Corporation,

Defendant-Appellant

Appeal from the
City Court of
The City of
Granite City

313 I.A. 224

CULBERTSON, P. J.


This is an appeal from a judgment of the City Court of the City of Granite City in the amount of \$4500.00, in favor of the Plaintiff-Appellee, ELLA FREEMAN (hereinafter called the Plaintiff), and against the Defendant-Appellant, THE LEADER MERCANTILE COMPANY, a Corporation (hereinafter called the Defendant).

After the verdict was returned, the Trial Court allowed defendant's motion for a judgment notwithstanding the verdict and entered judgment in bar of plaintiff's action, and that judgment was reversed by this Court and the case remanded in FREEMAN V. THE LEADER MERCANTILE COMPANY, 313 Ill. App. 652. The mandate of this Court ordered the Trial Court to overrule defendant's motion for judgment notwithstanding the verdict, and to pass upon the motion for a new trial, if one should be made, and if such motion for a new trial was overruled, or if such motion was not made, then the Trial Court was ordered to enter judgment on the verdict, in favor of the plaintiff. Thereafter, the case was redocketed and defendant filed its motion for a new trial, which motion was argued and overruled. Plaintiff then filed a motion asking the Court to include in the judgment, interest at the rate of 5 percentum per

annum on the amount of the verdict, from April 8, 1941 (the date the verdict was returned), to April 10, 1942 (the date the judgment was entered). The Court denied that motion, but entered judgment on the verdict. Plaintiff has assigned the denial of her aforesaid motion as a cross-error, and this appeal follows.

The evidence in this case discloses that plaintiff was severely injured on November 9, 1939 through falling on a stairway in a two story building in Granite City. The building was and for several years had been occupied by defendant as a general store, and plaintiff was then in the store as a customer. This stairway led from the first to the second floor and was made up of two sets of stairs, and a landing at about the center of such stairs. Four wooden steps about six feet wide led from the first floor to the landing. The landing, also of wood, but covered with linoleum, was about eight feet wide and ten feet long. A similar set of steps led from the landing to the top floor. There was no covering on the steps and no metal on the edge of the steps. The kind of wood used is not shown. The accident happened while plaintiff was descending or about to descend from the landing to the lower floor.

Plaintiff testified that she descended from the second floor to the landing, and then began to descend from about the center of the edge of the landing to the first floor; "that there are four steps from the first floor to the landing and the landing makes another step"; that in so descending she first stepped from the landing with her right foot and such right foot slid off the rounded edge of the top step, and she then fell on the stairs; that she started to slip on the edge of the landing; that her right leg doubled under her and was broken; that the heel of her left shoe was torn off in the fall; that while sitting or lying on the stairs after the fall she looked back to see what caused the fall and noticed that the landing was covered with old linoleum, and that the linoleum on the edge of such landing was worn off for a distance of about a foot, and the wood underneath was worn slick;



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that the steps were so worn that they were rounded on the outer edge; that "when I say the step was worn I mean a piece was worn off of it, taken out of the wood" on the landing; that the steps were worn off and slick from natural wear.

The proofs show that the stairway had been in the same general condition for at least five years, and during such time had been constantly used by a great many customers.

The specific charge of negligence in the complaint is that, the defendant negligently kept and maintained the stairway in a dangerous and defective condition, in that the steps were worn, depressed, uneven, and parts thereof worn and broken away, causing said steps to become slick and slippery.

As the result of plaintiff's fall she sustained several fractures of her right leg and ankle, and there is evidence in the record that plaintiff sustained a permanent disability of the ankle joint.

The manager of the defendant corporation's store testified that he went to plaintiff's assistance at the time she fell, but did not examine the steps as he was too excited. Another witness for defendant testified that he was on the balcony or platform to the left of the stairway, redecorating for toys, and that he heard plaintiff's yell and turned around and saw her sliding or bouncing down the steps. This witness further testified that three lights illuminated the stairs. This witness further testified that the treads on the stair are rounded, and were when the plaintiff fell, and that the steps were worn more in the middle than on the sides. Pictures of the stairs were received in evidence and the jury no doubt examined them in considering of their verdict.

This case having heretofore been before this Court, a re-examination of the question as to whether or not plaintiff's case should have been submitted to the jury is not before us, as that



has been disposed of by the previous opinion rendered in this case. The law is well settled that question of law which have been decided by an Appellate Court on the appeal of a cause will not again be considered on a second appeal; that they are binding not only on a Trial Court in the further progress of the cause, but also on the Appellate Court in any subsequent appeal. There is no mode provided by law, except it be upon a rehearing, whereby a final decision of a case in this Court can be reversed or set aside at a subsequent term. There must be an end of litigation somewhere, and there would be none if the parties were at liberty, after a cause had received the final determination of the Court of last resort, to litigate the same matter anew and bring it again and again before the Court for its decision. It is apparent then that the law of this case is that the questions of defendant's negligence and plaintiff's freedom from contributory negligence or questions of fact for the jury. In the event an examination of the evidence in this case discloses the judgment appealed from to be against the manifest weight of the evidence, this Court should, of course, set aside the judgment. We have very carefully examined the evidence in connection with this case, and from our examination of same, we find, and so hold, that the judgment is not against the manifest weight of the evidence.

Defendant contends that the Court committed error in its rulings upon certain instructions. It is contended that the measure of damage instruction given on behalf of the plaintiff, is erroneous. We have examined the instruction complained of and it appears to be an exact duplicate of the damage instruction approved in CHICAGO & MILWAUKEE ELEC. RY. CO., v. ULLRICH, 217 Ill. 170, at 171.

It appears from the record that all of defendant's instructions were given, except one, and it is urged in this Court that the refusal to give said instruction constituted reversible error.

We do not believe the Trial Court committed any error in refusing to give this instruction.

It is finally contended that the judgment in this case should be reversed for the reason that the verdict is so excessive, in view of the circumstances, as to indicate bias and prejudice. The evidence discloses that the fall sustained by the plaintiff caused four fractures in her left ankle. These fractures healed with fairly good bone union, but with a large amount of callus. A small spicule of bone, approximately an inch and a half in length and about the thickness of a lead pencil, extends from the site of one of the fractures and the end of this particle of bone did not re-attach itself to the bone of the ankle. It was the doctor's opinion that if this spicule of bone does not form a union, but becomes detached from its original position, it will then become a foreign body, and will come to the surface, necessitating its removal. The medical testimony further discloses that these fractures on the inside and outside of the ankle joint caused pain in the usual swaying motions of the foot and that they could cause a limp and difficulty in walking. The medical testimony discloses an opinion that plaintiff had a permanent disability of the ankle joint. From the evidence it appears that from the time of plaintiff's fall on November 9, 1939, she was unable to be up and about until after Easter the following year, and that she was then able to move about the house, but ^{was} unable to go outside of her home until June of 1940, and that it was sometime in May of 1940 before she could do her housework. She testified that because of the pain and discomfort in that joint it is necessary for her to set her foot flat on the ground and watch so that she does not step on anything rough and so that her ankle does not turn. She stated that she had a limp and an impairment in her walk, and that from the date of her fall, until late in the year, 1940, she suffered much pain and discomfort. The evidence discloses her hospital bill amounted to \$59.00, and her doctor bill, \$200.00, and that she expended

various other sums for medicines and for help about the house. Plaintiff testified that because of the limitation in the motion of her foot and the pain and discomfort she sustains when she puts her weight thereon, she has been unable to return to her former employment, and that at the time of the trial her loss in wages amounted to \$900.00.

This Court has said that an award of damages in a personal injury suit approved by the Trial Court, will not be set aside as excessive, unless it is so palpably excessive as to indicate some improper motive on the part of the jury (MUETH v. JASKA, 302 Ill. App. 289, 296). The judgment in this case we do not believe to be excessive. Plaintiff's request for interest on her judgment we deny.

There appearing no reversible error in this record, the judgment of the City Court of the City of Granite City is hereby affirmed.

Judgment affirmed.

FILED

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David J. Mallett

CL- K O L E E P E L I E C O U R T H C

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

Abstract

February Term, A. D. 197

318 I.A. 225

Term No. 42027

Agenda No. 8

ROY DAVIS

Plaintiff-Appellant,

vs.

COMMERCIAL FUEL AND SERVICE
COMPANY, a Corporation,
and HAROLD ROTHE

Defendants-Appellees.

Appeal from the

Circuit Court of

St. Clair County,

CULBERTSON, P. J.

This is an appeal from a judgment entered in the Circuit Court of St. Clair County, in favor of Defendants-Appellees, COMMERCIAL FUEL AND SERVICE COMPANY, a Corporation, and HAROLD ROTHE (hereinafter called defendants), and against Plaintiff-Appellant, ROY DAVIS (hereinafter called plaintiff).

Plaintiff brought suit against the defendants to recover for injuries which he sustained as the result of a collision between plaintiff's automobile, which he was driving, and defendant Company's truck, driven by defendant Rothe. Plaintiff alleged in his complaint that defendants were negligent in operating the truck and thereby proximately caused his injuries. Defendants denied they were negligent and plead affirmatively that plaintiff had released his cause of action by a certain release in writing. Plaintiff replied admitting the execution of the release, but denied that it operated to release plaintiff's claim. Defendants moved to strike plaintiff's reply, and after same had been amended, the Court overruled defendants' motion. Thereupon, defendants answered plaintiff's reply and denied every allegation therein contained, except that plaintiff signed the release and



that defendants paid plaintiff the sum of \$495.00. This case was tried before a Court and jury, and the jury returned a verdict of not guilty in favor of both defendants, and after a motion for a new trial had been denied, judgment was entered by the Court on the verdict of not guilty, in bar of plaintiff's cause of action, and for costs. This appeal follows.

From the evidence in this case it appears that the collision between plaintiff's automobile and defendants' truck occurred on Illinois Route 3, in Monsanto, near East St. Louis, Illinois, between one and two o'clock in the early morning of May 30, 1941. Illinois Route 3 is a four-lane north and south pavement, and at the time of the collision was brightly illuminated by sodium vapor lamps located at intervals on each side of said highway. It appears from the evidence that plaintiff was driving his automobile, a DeSoto coupe, north on Illinois Route 3, at a speed of 30 to 35 miles per hour. He was by himself and had been visiting a tavern in Dupo, Illinois, and there is evidence that he had drunk some beer at the tavern. He was driving to East St. Louis to get some lunch at the time the collision occurred.

Defendant Rothe, accompanied by his wife, was driving a truck consisting of a tractor and trailer, south on Illinois Route 3. The truck had three marker lights above the cab, and a marker light on the corner of the trailer, in addition to the headlights which were burning at the time of the accident. Rothe had started to work at 11:00 O'clock in the evening of May 29, and was returning from St. Louis Missouri, where he had delivered his first load of rock. Rothe and his wife both testified that they observed plaintiff's car when it was about 600 to 850 feet away from them. The collision occurred two, or two and a half, blocks south of the Illinois Central tracks, which are elevated over Illinois Route 3. Defendant Rothe testified that he drove into the passing lane for south-bound



traffic after he came from under the tracks to pass a slow-moving south-bound car traveling in the outside west lane. He testified that he drove past this car and had gotten the front end of the tractor in the outside west lane when Davis' car, angling across the center line of the pavement, struck the left rear tractor wheels and scraped all along the side of the trailer. From the evidence it appears that plaintiff's car continued on across the pavement at the same angle and stopped entirely on the west (his left-hand) shoulder of the pavement, 200 to 300 feet from the point of the collision. Defendant Rothe testified that plaintiff's car was following behind a car driven by a man named Welles, in the outside east lane, when Rothe first observed it. Plaintiff testified that he moved into the inside east lane to pass the Welles car and that the front end of his car got about to the rear end of Welles' car when the collision occurred. Defendant Rothe and his wife both testified that when Davis pulled from behind Welles' car he did not straighten out, but continued in the same direction on across the black center line. There is evidence in the record that after the collision plaintiff, when asked what was the matter, told the defendant Rothe, "I don't know what. I just got sick, when I started to pass the welles car." Both Rothe and his wife positively testified no part of the tractor or trailer was east of the center line of the pavement at any time and that the speed of the truck at the time of the accident did not exceed 35 miles an hour.

Plaintiff, on his part, contends that while he was driving his automobile northward on Route 3 on the inner lane, just prior to reaching the point of collision, the defendant sought to pass and did pass another south-bound vehicle, but in so doing, veered over the center line of the highway into the north-bound (innermost) traffic lane, then being occupied by the plaintiff, and that as the result thereof, a side-swiping



collision occurred. Plaintiff contends that when he contemplated passing the Welles car he was driving on the inner north-bound lane about one to one and a half feet east of the center line, and that he observed approaching him a south-bound automobile, straddling the line dividing the two south-bound traffic lanes, and that he also noticed a south-bound truck (the defendant's) immediately behind the approaching south-bound automobile, and when plaintiff's car and the oncoming south-bound truck were about 50 to 100 feet apart, the truck swerved out from behind the automobile to pass it and in so doing swerved with its tractor and trailer over the center line of the highway about two feet, and in so doing partially blocked the lane on which plaintiff was traveling. Plaintiff contends that defendants' truck was then traveling at about 40 to 45 miles per hour, and that its rear end side-swiped plaintiff's car commencing just back of the left front fender. As the result of the accident plaintiff sustained injuries to his left arm, which was resting on the left door window. He was taken to the hospital by Welles, the driver of the north-bound vehicle, and the defendant Rothe and Mrs. Rothe accompanied them. Gangrene immediately developed and the plaintiff's left arm was amputated above the elbow at about eight p. m. of the day of the accident.

From the evidence in this case it appears that the plaintiff executed a written release of his cause of action in this case some thirteen days after the occurrence of the accident, and the consideration paid for said release was \$495.00. Many pages of the record in this case are taken up with the contentions advanced by plaintiff to render said release of no effect, and quite a full recitation is made of the occurrences at the time of the execution of the release. The release having been asserted as a defense in this case, we believe a question of fact was tendered thereon for the consideration of the jury, and their finding thereon, as manifested by their verdict, we



are not disposed to disturb.

It is contended in this Court that the judgment of the Trial Court should be reversed for the reason that the Court erred in denying plaintiff's motion for a new trial, and in entering judgment on the verdict, and that the verdict is against the manifest weight of the evidence, and that the Court erred in his rulings on the evidence, and that the Court erred in giving to the jury defendants' instructions 2, 7, and 9.

We are mindful of the Rule that it is the duty of the Appellate Court to set aside the verdict, and judgment entered thereon, which is clearly against the manifest weight of the evidence (NAVRATEL v. CURTIS DOOR & SASH CO., 290 Ill. 526, 527; WHITE v. CITY OF BELLEVILLE, 364 Ill. 577, 580; ILLINOIS CENTRAL R. R. CO. v. SMITH, 208 Ill. 602, 620; BAUMBISTER v. BOWERS, 271 Ill. App. 332, 336; MABLE v. C. C. C. & ST. L. R. R. CO., 264 Ill. App. 532; FITZGERALD v. CHICAGO & ERIE R. R. CO., 144 Ill. App. 100, 103), and with that in mind, we have given careful consideration to the evidence in this case and conclude that the verdict and judgment entered thereon is not clearly against the manifest weight of the evidence, but on the contrary, is amply supported by the evidence.

Plaintiff contends that the Court committed prejudicial error in ruling on the evidence in that there appears in evidence as Plaintiff's Exhibit No. 1, a statement signed by defendants' witness Bertha Rothe, which statement she admits she signed, and in which statement her account of the collision appears to be somewhat at variance with her testimony given on the trial. Plaintiff contends that all of such statement should have been read to the jury, and the defendants contend, and the Trial Court supported them in their contention, that only such portions of the statement as were contradictory to the witness' testimony, should be read to the jury. We believe it to be the Rule (if the writing as a whole is contradictory, the whole should be read



to the jury), but here the writing by which it is sought to impeach the witness, contains matter which is irrelevant and incompetent. Only such parts of the writing as are contradictory to or inconsistent with the testimony of the witness should be read to the jury by the impeaching party. An examination of the statement in question does not disclose that the entire statement is contradictory and plaintiff, having been permitted to read to the jury such portions of the statement as appeared to be at variance with the witness' testimony, we believe, was accorded that consideration to which he was entitled, under the law, and we hold that the Court committed no error in not permitting the entire statement to be read to the jury.

Finally, it is urged that plaintiff is entitled to a reversal in this case for the reason that the Court committed reversible error in the giving of defendants instructions 2, 7, and 9. We have examined said instructions with great care. We find no error in instructions 2 and 7. Instruction 9, wherein the word "establish" is used does not have our approval, but we are not disposed to hold the giving of this instruction to be reversible error, under the evidence in this case.

We, as a reviewing Court, are not at liberty to substitute our judgment for the verdict of the jury, when approved by the trial Judge, unless the evidence is clearly insufficient to support the verdict. (BELZ v. PIEFENBRINK, 318 Ill. 528, 535; MUETH v. JASKA, 302 Ill. App. 289, 294), and to so hold in this case, we must decline.

There being no reversible error in this case, the judgment of the Circuit Court of St. Clair County is hereby affirmed.

Judgment affirmed.

FILED

MAR 2 1943

6.

David J. McCall
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT ILLINOIS



Abstract

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

February Term, A. D. 1943

316 I.A. 225²

Term No. 42030

Agenda No. 10

JAMES BUTLER and FRED
BUTLER,

Plaintiffs and Appellees,

vs.

DR. JAMES H. LEWIS,

Defendant and Appellant.

Appeal from the
Circuit Court of
Saline County

CULBERTSON, P. J.

This is an appeal from two judgments for \$1250.00 each, recovered in the Circuit Court of Saline County, Illinois, by JAMES BUTLER and FRED BUTLER, Plaintiffs-Appellees (hereinafter called plaintiffs), and against DR. JAMES H. LEWIS, defendant-Appellant (hereinafter called defendant).

Plaintiffs, in their complaint, charged that the defendant did maliciously institute criminal prosecution against them, charging larceny of some hogs belonging to the defendant. The first count in the complaint charges that the defendant, with a malicious intent to injure the plaintiffs, instituted criminal charges in Jackson County, Illinois, and the second count is substantially the same, except the plaintiffs charge that criminal proceedings were instituted in Saline County before a Justice-of-the Peace, and then afterwards, by indictment and prosecution in the Circuit Court, wherein the plaintiffs were found not guilty.

From the evidence in this case it appears that the defendant is a practicing physician and surgeon in the City of Harrisburg, Illinois, and is the owner of a farm near Carrier



Mills, in Saline County, and that in November, 1938, the plaintiffs herein lived in Jackson County, Illinois, near Elkhart. It appears from the evidence that some time in November, 1938, the plaintiff, James Butler, pursuant to an arrangement made with the defendant, moved to Saline County, on a farm owned by the defendant. The evidence discloses that at that time the defendant owned cattle, hogs, and horses, and that he also had a large amount of grain on the farm, such as corn, wheat, peas, soybeans, and oats, and the evidence was that the plaintiff, James Butler, had complete charge of the livestock and grain and had possession of the keys to the granaries and the keys to the gates of the various places on the farm. It appears that about January 5, 1939, the defendant herein was injured in an automobile accident and did not visit the farm until about the middle of February of that year. He testified that when he visited the farm he missed numerous amounts of his property, such as cattle, hogs, corn, wheat, oats and soybeans. The defendant testified that he immediately began investigating the loss of his property and found that plaintiff herein, Fred Butler, had traded some hogs to a Mr. Macklin of Duquoin. This defendant testified that he inspected the hogs that had been sold to Mr. Macklin and identified them as some hogs that he had left in the care of the Butlers, and that he based his identification of the hogs by some peculiar marks at the base of the ear that a former employee had cut on these hogs. Defendant also testified that the hogs he found at the Macklin farm corresponded in weight, color, had been oiled, and had the same mark at the base of the ear as did the hogs he had left in charge of the Butlers. The defendant further testified that he informed Mr. Macklin of what he had found and that the hogs were turned over to him and transferred to his farm at Carrier Mills, in Saline County. The identification found on the hogs appears to be that they had been marked with a half-moon-shaped excision,

THE UNIVERSITY OF CHICAGO PRESS

cut out of the base of the ear, and it appears from the evidence of Burnett Hughes, a former employee of the defendant herein, that he had placed this kind of a mark on hogs owned by the defendant herein.

After the defendant found the hogs at the Macklin farm, which was on May 7, 1939, he testified that he consulted the Sheriff of Jackson County, who advised him to file a complaint with the Justice-of-the-Peace in Jackson County. Complaint was filed and a warrant issued and both plaintiffs, James and Fred Butler, were arrested and placed in jail in Jackson County, but after consulting with the States Attorney of Saline County, a charge was filed before a Justice-of-the-Peace in Saline County and the plaintiffs were transferred to the Saline County jail and a preliminary hearing was held before a Justice-of-the-Peace on May 9, 1939, at which time the defendant appeared as a complaining witness with the States Attorney, and the plaintiffs appeared with their attorney. After a hearing was had it was found by the Justice-of-the-Peace that there was sufficient evidence to hold the plaintiffs for action of the Grand Jury of Saline County, Illinois. The defendant appeared before the Grand Jury of Saline County, on December 6, 1940, and testified, and an indictment charging the plaintiffs with larceny of the defendant's hogs was returned. The plaintiffs herein were tried on said indictment on December 17, 1940 and were found not guilty by a jury in the Circuit Court of Saline County.

From the evidence it appears that the defendant consulted with the States Attorney of Saline County, Illinois, previous to the filing of the complaint charging the plaintiffs with larceny before the Justice-of-the-Peace. It also appears that the defendant herein appeared before the Grand Jury that indicted the plaintiffs herein, in response to a subpoena. Before the trial of the plaintiffs on the indictment, there was a change in the



office of States Attorney. Defendant testified that previous to the trial he was called into the States Attorney's office by Assistant States Attorney Flanders, at which time he informed the Assistant States Attorney of the facts pertaining to the guilt of the plaintiffs as to the charge of larceny of his hogs and that he was advised by both States Attorney Melton (at the time the complaint was filed) that there was probable cause of guilt, and also advised by Assistant States Attorney Flanders, previous to the trial in the Circuit Court, that there was probable cause of guilt, and that the plaintiffs should be prosecuted.

Defendant further testified that when he first learned of the plaintiff, Fred Butler, trading hogs (that he afterwards identified as his own to Mr. Macklin) that in company with the Sheriff of Jackson County, Illinois, he went to the home of Fred Butler, near Hallidayboro, and there they found a barrel that had some soybeans and oats in it, and in the house they found 62 bags of shelled corn and a quantity of corn on the floor, and also, some soybeans in bags, and some oats and wheat in bags. The defendant testified that he was able to identify the bags as being some bags he had borrowed from the Woolcott Milling Company, in Harrisburg, but, of course, could not identify the grain.

Defendant, on this appeal, contends that he had reasonable grounds to believe that the plaintiffs were guilty of larceny as charged, and that his acts in instituting criminal proceedings against them, were not without probable cause and were not with a malicious intent.

Joe Oehlert, when called as a witness in behalf of the plaintiffs, testified he sold the hogs in question to James Butler the latter part of February, 1939. James A. Wyatt and Richard Gray, when called as witnesses for the defendant, testified that shortly after May 12, 1939 they called to see Joe



Oehlert, preparatory to bringing him to testify as a witness for the Butlers, and at that time he told them, "I never sold them any hogs; never made any trade with them. All they did was look at my hogs." When asked on cross-examination as to whether or not he had ever made this statement to Wyatt and Gray, Oehlert does not appear from the record to have made an unqualified denial of having made the statement.

From the evidence it appears that plaintiffs claim to have expended about \$600.00 defending themselves in the criminal prosecution against them.

James A. Wyatt, a witness called on behalf of the defendant, testified that he had been a school teacher for nine years; that he recalled the time when James and Fred Butler were arrested and charged with stealing some hogs from Dr. Lewis. This witness testified that after their arrest he talked with the Butlers in the Jackson County jail, and he also talked with them at the Saline County jail, about Oehlert being a witness for them. He testified that the Butlers told him to be sure and bring Oehlert over on time for the trial as he was the one they had bought the hogs from, and in response to their request he called to see Oehlert at his place of business in Murphysboro and that John Smith and Richard Gray were with him at the time.

Henry J. Flanders, when called as a witness for the defendant, testified that he is a practicing attorney in Saline County and had been engaged in the practice of law since 1922; that he is specially hired by the County Board to assist the States Attorney in the prosecution of criminal cases and was employed in that capacity in December, 1940, and as such Assistant Prosecutor he assisted in prosecuting the case of The People vs. James and Fred Butler, charged with larceny of some hogs from Dr. James H. Lewis. This witness testified that previous to the trial he had a conference with Dr. Lewis with reference to

the prosecution of the case, and that he examined the indictment and talked with the defendant about the case and asked him what he expected to prove by each of the witnesses endorsed on the indictment. It appears that Mr. Flanders assisted the States Attorney in the trial of the case. This witness testified that he advised Dr. Lewis upon the representations that he had made that there was reasonable grounds to believe that James Butler and Fred Butler could be convicted.

Lloyd H. Melton, the States Attorney of Saline County, in May, 1939, and who had been practicing at that time for twelve or fifteen years, testified that he consulted with the defendant herein with reference to a larceny charge against James and Fred Butler, and that he conducted a preliminary hearing on behalf of the People, before a Justice-of-the-Peace at Harrisburg, on May 12, 1939. This witness testified that he talked with Dr. Lewis about the charge he had filed against James Butler and Fred Butler and made an investigation of the charge, and from his investigation at that time he had an opinion that there was reasonable grounds to believe that they were guilty of the charge, and that in his opinion, there was reasonable probability to believe that they were guilty and that he so advised Dr. Lewis; and this witness further testified that after conferring with Dr. Lewis, he made an independent investigation, and from the facts he learned, after talking with Fred Butler, and other witnesses, he discovered no misrepresentation of any kind that Dr. Lewis had made.

The defendant in this case, on the trial, produced five witnesses who were former neighbors of the plaintiff herein, and they all testified that they were acquainted with the reputation of the plaintiffs, in the vicinity in which they resided, and that their reputation as being honest and law-abiding citizens, was bad.

The foregoing, we believe, constitutes a full and accurate statement of the evidence as same was developed on the trial of this cause.

It is contended by the defendant on this appeal, among other things, that he had reasonable grounds to believe that the plaintiffs were guilty of larceny, as charged, and that his acts in instituting criminal proceedings against them were not without probable cause, and not with a malicious intent. An action for malicious prosecution is an action in tort to recover damages for the institution, maliciously, and without probable cause, of a suit which has terminated in favor of the defendant therein (SHEDD vs. PATTERSON, 312 Ill. 371). One is not liable in damages for malicious prosecution although the person against whom he instituted or caused to be instituted criminal proceedings is found not guilty, if he acted upon probable cause (BERNER vs. PRARIE STATE BANK, 281 Ill. App. 31). "Probable cause" which will justify institution of a criminal prosecution and prevent liability for institution thereof, is a belief held in good faith by the prosecutor of the guilt of the person charged, based upon circumstances strong enough to induce such a belief in the mind of a reasonably cautious person with respect to the particular offense (BERNER vs. PRARIE STATE BANK, supra).

It is the well-established law of this State that when the prosecuting witness fully and fairly states all the facts relative to a proposed prosecution to reputable counsel and receives advice from such counsel that there is probable cause for a criminal prosecution, that it is a complete legal defense when he acts on this advice (GLENN vs. LAWRENCE, 280 Ill. 581; GALARZA vs. SPRAGUE, 284 Ill. App. 261). As was stated in GALARZA vs. SPRAGUE, supra, a party ought not to be held guilty when he sets in motion a criminal prosecution, simply because he fails to convict the person accused, or, indeed, in



every case where he fails to show the party is guilty. It is sufficient if there is probable cause, whether the person accused is, in fact, guilty, or not.

We believe the record in this case discloses a complete absence of anything malicious on the part of the defendant herein in instituting proceedings against the plaintiffs herein, and we are further persuaded from the evidence that he acted not without probable cause in instituting said proceedings, and those facts, coupled with his conduct in receiving advice from counsel in the matter, we believe constitutes a complete legal defense in this case, and under the showing made, we believe the Court should have directed a verdict in favor of the defendant in this case.

For the reasons hereinbefore set forth the judgments of the Circuit Court of Saline County are each hereby reversed and judgment in bar of plaintiff's cause of action, as to each plaintiff, is hereby entered in this Court.

REVERSED, WITH JUDGMENT HERE,
IN BAR OF PLAINTIFFS' CAUSES
OF ACTION.

FILED

MAR 2 1912

David J. Madill

CLERK OF THE APPELLATE COURT
COURT OF THE STATE OF ILLINOIS



Abstract

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

February Term, A. D. 1943.

Term No. 42016

Agenda No. 25

HENRY PETTERSSON,

Plaintiff-Appellee,

vs.

CHARLOTTE BORNEMANN,

Defendant-Appellant

318 I.A. 226

Appeal from

Circuit Court

St. Clair County.

BRISTOW, J.

By this appeal it is sought to reverse a decree entered upon a final hearing, in favor of the plaintiff, Henry Pettersson, and against Charlotte Bornemann, based upon an accounting, under Chapter 76, Section 4, Illinois Revised Statutes. The judgment is for the sum of Six hundred Fifty-six dollars and Ninety-nine Cents. The parties will hereafter be referred to as plaintiff and defendant.

The second amended complaint upon which the case was tried alleges inter alia that on December 28, 1937 plaintiff obtained a fee simple estate in an undivided one-half interest in three separate tracts of land, describing each; that he continued to hold the estate in fee simple until January 19, 1940; that he was a tenant in common with the defendant and four others; that plaintiff and defendant had an agreement where the defendant was to collect all the rents and was to hold plaintiff's share for his use; that defendant assumed the management and care of the whole of the real estate; that during the time she collected rents from tract number one in the sum of Thirty-five dollars per month, or a total sum of Eight Hundred Sixty-four Dollars; from tract number two, Twenty-five Dollars per month, or a total sum of Six Hundred seventeen Dollars; from tract number three, Thirty dollars per

month, or a total sum of Seven Hundred forty-one Dollars; that the defendant collected approximately Twenty-two Hundred Dollars in rents, and that one-half of the rents belonged to the plaintiff as owner of an undivided one-half of the premises.

The complaint further alleges that in chancery case 3326 of this court, which was a suit for partition of the premises described in the complaint, defendant herein was the plaintiff, and plaintiff was the defendant, and that before the case was heard one H. Grady Vien as attorney of record for Charlotte Bornemann, on her behalf, entered into an agreement with Dan McGlynn, as attorney of record for Henry Pettersson, providing that the claim of Henry Pettersson to the rents of the premises would not be adjudicated in the partition suit and said claim would not be barred by said partition suit and that Harold Baltz, master in chancery who heard the partition suit at the time of the hearing had knowledge of the agreement.

It further alleges that defendant received more than her due proportion of the rents but has failed to render a reasonable account thereof to the plaintiff, and has failed and refused to pay the plaintiff his share of the rents or any part thereof; that subsequent to the agreement Charlotte Bornemann assumed a vicious and hostile manner toward the plaintiff herein and that a demand by plaintiff upon the defendant for his portion of the rents would have been useless; that defendant had not rendered to the plaintiff an account of said rents or any part thereof or of plaintiff's share, and refuses to do so, contrary to Chapter 76, Section 4, Illinois Revised Statutes 1939, setting forth the statute haec verba. Plaintiff asks for a judgment for Eleven Hundred Dollars.

The second count was a common count alleging that on January 20, 1940 defendant herein was indebted to the plaintiff in the sum of Eleven Hundred Dollars for money had and received and that though request was made for the payment defendant refused to pay any part thereof, and a prayer for Eleven Hundred Dollar

judgment was included.

Defendant filed her answer to the second amended complaint which consisted of a general denial of each and every paragraph as to the first count, and denied generally that defendant was indebted to the plaintiff in the sum of Eleven Hundred Dollars or any other sum for monies had and received. Upon the issues thus formed the chancellor heard evidence and considered stipulations of fact and entered the decree appealed from.

Defendant states in her brief on page two, "The ultimate issues and sole question for review is, "Are the instant proceedings, under the pleadings and upon the evidence offered and the law applicable, barred because the right, if any, of plaintiff to a share of the rents in question, falls under the doctrine of res judicata, there having been a final adjudication and determination of all the interests of the parties to this suit in certain real estate, the same premises from which accrued the rents, the subject matter of this cause, in a partition suit theretofore pending between the same parties to this cause and other tenants in common of said real estate."

Taking that statement literally it would be the duty of this court to affirm the judgment since defendant's counsel did not file a plea of res judicata. We have set forth the pleadings in this opinion to point out that they are not sufficient to raise the question of an estoppel. If a previous adjudication is relied upon as a bar it must be set up by plea or answer (Mettler v. Warner, 243 Ill. 600). The burden of establishing estoppel is upon him who invokes it in order that a judgment or decree shall operate as an estoppel. It must either appear on the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit (Gouwens v. Gouwens, 222 Ill. 223; Sawyer v. Nelson, 160 id. 629). To the same effect is Svalina v. Saravana, 341 Ill. 236-247; Hutson v. Huddleston,

288 Ill. 454, op. 459. There is nothing before this court except a mere reference to this partition suit in the seventh paragraph of the plaintiff's amended complaint. After a careful consideration of the instant contention we have reached the conclusion that it is without merit.

It is next argued that, "it is a well known and long established principle of law and a part of our jurisprudence, that, upon him who alleges the existence of a fact material to the case falls the burden of proving such facts". We are wholly in accord with that abstract proposition of law and can not treat that as an assignment of error. We shall, however, consider that in connection with what appears on page fourteen of defendant's brief under the heading of "The Proof", in ascertaining whether or not the plaintiff has met the burden of proof.

The briefs filed by both parties indicate that no controverted question of law is involved. The only controversy seems to center on paragraph seven of plaintiff's complaint. Excluding that paragraph from the complaint and treating it as surplusage, we are of the opinion that the complaint sets forth a good cause of action under Section 4 of Chapter 76 of the Statutes. Since by stipulation of the parties every allegation, with the exception of paragraph seven in the complaint, is admitted, we can hardly conceive how the chancellor could have come to any other conclusion than he did. Dan McGlynn testified that he was attorney of record for Pettersson, one of the defendants in the partition suit, and Mr. H. Grady Vien was attorney of record for the defendant Charlotte Bornemann; that as an accommodation he appeared before the master in chancery and proved up the case on behalf of Mr. Vien, although he represented one of the defendants, with a specific understanding that the rent dispute existing between the parties and involved in this litigation, was to be taken up later. This agreement was made with defendant's counsel who was of record. His

authority to bind his client can not be questioned. In the case of American Car Company v. Industrial Commission, 335 Ill. page 322, the court in passing upon a similar question, said: "Where an attorney is counsel of record for his client, his agreements and stipulations made in the conduct and management of the litigation must be considered as the agreement of his client, and if any of his acts are without sufficient authority as between him and his client, the remedy of the client is against the counsel. (Bergman v. Rhodes, 334 Ill. 137; Hungarian Benevolent Soc. v. Aid Soc., 283 id. 99.)" No question is raised about Mr. Vien acting without sufficient authority. As against the unimpeached and apparent candid testimony of Mr. McGlynn, Mr. Vien testified that he represented the defendant in that case; that he has a practice of preparing memorandums regarding agreements, and puts them in his files; that he received a letter from Mr. Baltz, attorney for the defendant in the instant case; that at that time he reviewed two or three files pertaining to the affairs of defendant and couldn't find any memorandum of any such agreement, and definitely stated, "I don't have any independent recollection." This negative testimony was further weakened by the statement of Mr. Vien that, "Unless I forgot to do it at that particular time, there would be a memorandum dictated to the stenographer or ediphone and it would be transcribed by the stenographer and placed in the file, stating the nature of the agreement or conversation".

So that we have the uncontradicted testimony of Mr. McGlynn that he did have an agreement with the attorney of record who was conducting and managing the litigation of the defendant.

The Supreme Court in the case of Larson v. Gloss, 235 Ill. 584, said: "Where the testimony of a witness is uncontradicted, either by positive testimony or by circumstances, either intrinsic or extrinsic, and the witness is not impeached, the testimony cannot be rejected, even by a jury." To the same effect is Kelly v.

Abstract

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

FEBRUARY TERM, A. D. 1943.

Term No. 42015

Agenda No. 5

ESTHER HARPER, Administratrix of the
Estate of Andrew Harper, Deceased
and Andrew J. Harper,

Plaintiff-Appellee

vs.

GUY A. THOMPSON, Trustee, Missouri
Pacific Railroad Company, a Corpo-
ration.

Defendant-Appellant

318 I.A. 226²

Appeal from the

Circuit Court of

Williamson County

STONE, J.

On September 18, 1940, at about two A. M. Andrew J. Harper, Jr., was fatally injured when he drove his father's automobile into the side of a coal car, which was one of a train of eighteen then standing cars which were in the process of being switched over appellant's railroad crossing near Herrin, Illinois.

This is an appeal from two judgments predicated upon the verdict of a jury, one a judgment of two thousand dollars in favor of appellee, Esther Harper, Administratrix of the Estate of Andrew J. Harper, Jr., who will be hereinafter designated as Plaintiff, for the alleged wrongful death of her husband, the intestate, and a judgment for three hundred dollars in favor of Andrew J. Harper, Sr., father of plaintiff's intestate, covering damage done to his automobile and against Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a Corporation, appellant, who will be hereinafter designated as defendant.

The facts in the record are practically undisputed. The defendant owned and operated a switch track, which ran approximately north and south and crossed a concrete highway about seventeen

hundred feet east of the city limits of the City of Herrin. Train operations over this crossing were infrequent. The tracks here are level with the concrete. There is a very gradual grade down to the crossing from the east, and the highway is straight, with nothing to obstruct the view for 700 feet of one using the highway and driving toward the west. At about two o'clock on the morning in question, defendant's locomotive, with eighteen cars pulled south over the crossing, and came to a stop, leaving the sixth car of the train across the highway. The train had been standing one to one and a half minutes, at the time of the accident. Joseph Roadhaver, one of defendant's switchmen, who was used by plaintiff, as a witness, and who was the only eye-witness to the accident, was on the west side of the crossing, and had just commenced to uncouple between the sixth and seventh car, when he saw the lights of the Harper car coming toward the west over a rise about 600 to 700 feet east of the crossing. The automobile was coming at the rate of fifty to sixty miles an hour, its lights were on bright, and it did not abate its speed. Roadhaver got to the center of the highway from his position about nine feet away and commenced waving his lighted lantern under the coal car. The automobile did not slacken its speed until it struck the standing car. It struck the coal car with such violence that its entire motor was driven under the car and the efforts of six men and the locomotive were required to extricate it. Harper was instantly killed.

It is the contention of plaintiffs that because of the unusual physical circumstances and characteristics of the crossing involved; the fact that there were no lights at the crossing, nor on the coal car, which was struck, and no flagman upon the east side of the crossing, to warn motorists approaching from the east, that there were present extraordinary and unusual circumstances of hazard and danger, and that therefore defendant was guilty of negligence, and was liable for the death of plaintiff's intestate, and for damage to the automobile.

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Five witnesses testified on behalf of plaintiffs, as to the difficulty of seeing a train at night, at this crossing, based upon their personal experiences. One witness accounted for this by blaming atmospheric conditions, which he described as the color of black coal cars and the color of night blending together.

Defendant's first assignment of error relied upon for reversal presents the question whether there is in the record sufficient evidence of due care on the part of plaintiff's intestate to support the verdict and judgment. Plaintiffs had the burden of affirmatively showing that deceased was in the exercise of due care and caution for his own safety, and for the safety of the property in his charge, at the time of the accident which resulted in his death and damage to the automobile, or in the absence of direct testimony, showing such care that reasonable inferences of such due care and caution might be drawn from the circumstances disclosed by the evidence. If the negligence of deceased contributed to the injury plaintiff cannot recover. *Wilson vs. Illinois Central Railroad Company*, 210 Ill. 603; *Dee vs. City of Peru*, 343 id. 36.

It is the contention of plaintiffs that where there are no eye witnesses to a collision or accident, proof that decedent, at the time of collision was in good health, steadily employed and of good habits, and driving on that part of the roadway where normally he had a right to be, would be sufficient to show due care on the part of said decedent. There is a legal presumption that all persons observe the instincts promoting preservation of life, which presumption, standing alone, is sufficient to take to the jury the question of due care of one for whose death an action for damages is being maintained, provided contributory negligence does not affirmatively appear. *Hill vs. Richardson*, 281 Ill. App. 75. Presumptions, however, have no force when confronted with evidence even of the slightest character. *Redmond vs. Gillis*, 346 Ill. 223. Had there been no eye witness to the accident, plaintiff might have relied upon this presumption. However, plaintiffs produced as their own witness,

Joseph Roadhaver, a switchman at that time, in the employ of defendant, now retired on pension, who testified that he was at the crossing at the time the automobile struck the train, that he was facing in the direction of the approaching driver and saw him as he neared the train. He was in a position to observe his conduct just immediately before and at the time of the collision.

The complaint charges that this was an especially dangerous crossing. It has long been the rule in this State that it is the duty of persons about to cross a dangerous place to approach it with care commensurate with the known danger and when one on a public highway fails to use ordinary precaution while driving over a known dangerous place, such conduct is by the general knowledge and experience of mankind condemned as negligence. *Dee vs. City of Peru*, supra; *Greenwald vs. Baltimore and Ohio Railroad Co.* 332 Ill. 627; *Graham vs. Hagnann* 270 id. 252; *Lake Shore and Michigan Southern Railroad Co. vs. Hart*, 87 id. 529. It is the duty of the traveler on the highway to travel at such speed and have his car under such control that he can bring it to a stop to avoid striking a standing train or other obstructions in the highway. *Fox vs. Ill. Central R. Co.* 308 Ill. App. 367. *Miles vs. Am. Steel Foundries*, 302 Ill. App. 262. *Cash vs. N. Y. Central R. Co.* 294 Ill. App. 389. *Overstreet vs. Ill. Power & Light Corp.* 356 Ill. 378. *Coleman vs. C. B. & Q. R. Co.* 287 Ill. App. 483. *Scruggs vs. B. & O. R. R. Co.* 287 Ill. App. 310. *Fuller vs. Peoria & Pekin Ry. Co.* 164 Ill. App. 385. *Johandes vs. C. M. & St. P. R. R. Co.* 260 Ill. App. 328. *O'Neal vs. Blair* 261 Ill. App. 470.

The undisputed testimony of the witness Roadhaver is to the effect that he could see the lights of the approaching car, that the bright lights were on, that the driver was approaching the crossing at a speed of possibly fifty to sixty miles per hour, that witness waved his lantern under the coal car, where the driver could see it, and that he did not stop or slacken his speed. The evidence in the record is also to the effect that decedent was

familiar with this road and with the crossing, at which he met his death. The evidence also shows that the automobile in question was in good mechanical condition, and that with the brakes thereon, one traveling thirty miles an hour could stop the car in fifteen to twenty feet; going forty miles an hour, in forty feet; fifty miles an hour, sixty feet; and sixty miles an hour, in seventy feet.

It is well established that in order to sustain a verdict for damages for personal injury it is incumbent upon the plaintiff to allege and prove the existence of a duty on the part of defendant to protect the plaintiff from the injury of which he complains, and the failure of defendant to perform that duty, which failure, resulted in the injury. *Overstreet vs. Illinois Power and Light Corp.* 356 Ill. 378. In the case at bar, the train of defendant was rightfully occupying the crossing at the time of the accident. Plaintiffs' theory of negligence seems to be predicated upon the lack of a flagman, and of lights at the crossing. The office of a flagman and of lights is to warn travelers of approaching trains. When a train has reached the crossing and parties riding in a vehicle approaching the crossing know or could know by the exercise of due care and caution, that the train is there, the flagman and the lights have performed their function. *Fuller vs. P. & P. Union Ry.* 164 Ill. App. 385. In the case of *Coleman vs. C. B. & Q. R. R.* 287 Ill. App. in considering a case very similar to the instant case, the Court said:

"It is thus apparent that the decided weight of authority establishes the proposition that where a railroad train rightfully and for a reasonable period of time occupies a crossing of its tracks with a public highway, the very presence of the train is adequate notice and warning to any traveler, who is in the exercise of ordinary care for his won safety, that the crossing is occupied; that no additional signs, signals or

or warnings are required to be given by the railroad company, and that no negligence can be imputed to it for its failure so to do."

Op. 489.

The law that one cannot recover for driving his automobile into a train standing across a crossing, except under extraordinary or unusual circumstances is so well settled in this State, that it would seem to admit of little or no further argument. Fox vs. Ill. Central R. Co. supra; Miles vs. Am. Steel Foundries, supra; Cash vs. N. Y. Cent. R. Co. supra; Overstreet vs. Ill. Power & Light Corp. supra; Coleman vs. C. B. & Q. R. Co. supra; Scruggs vs. B. & O. R. R. Co. supra; Fuller vs. Peoria & Pekin Ry Co. supra; Johandes vs. C. M. & St. P. R. R. Co. supra; O'Neal vs. Blair, supra.

We find no such extraordinary or unusual circumstances in the instant case, that would make it an exception to the general rule. Upon this record, it could hardly be claimed that this was a dangerous crossing. The deceased approached it, undistracted by other motor traffic, on a slow, evenly descending grade for the last seven hundred feet, before he hit the train, driving an automobile in good mechanical order, with the brakes in good condition, and his view unobstructed, on a straight road that he had driven on many times before. It is undisputed in the record that his bright lights were on and he was driving at the rate of from fifty to sixty miles an hour. In addition to the undisputed testimony of the witness Roadhaver, as to the speed of the car, we have the evidence of Defendant's Exhibit 1, which is a photograph of the automobile driven by decedent, showing its wrecked condition after the accident, which is mute but convincing proof of the force of the impact when the automobile hit the side of the coal car.

Upon this record we are of the opinion that all reasonable minds in honest judgment, will agree that plaintiff's intestate,

at the time of and just prior to the accident was guilty of negligence which contributed proximately to his death. We do not deem it necessary to discuss other errors relied upon for reversal. For the reasons herein assigned the trial court erred in not taking this case from the jury at the close of all the evidence and by reason of such error these judgments are reversed. This case is remanded to the Circuit Court of Williamson County, with directions to that court to render judgment against both plaintiffs for costs notwithstanding the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

FILED

MAR 2 1943

David J. Mallitt

CLERK OF THE DISTRICT COURT
OF THE STATE OF MISSOURI

Abstract

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

OCTOBER TERM, A. D. 1942

Term No. 42021

Agenda 29

HENRY GUNN,

Plaintiff-Appellee

vs.

J. R. BRITT,

Defendant-Appellant

313 I.A. 227

Appeal from the

Circuit Court of

Pulaski County, Illinois

STONE, J.

This is an appeal by defendant Britt from an order entered April 30, 1942, vacating an order entered August 27, 1940. This case was before us once before (Gunn v. Britt, 313 Ill. App. 13).

Appellee Henry Gunn obtained a judgment in the Justice of the Peace court against Appellant Britt for the sum of \$292.00 and costs of suit. Britt perfected an appeal to the Circuit Court of Pulaski County. On April 24, 1940, one of the days of the April Term of said Court, said cause was called for trial. Neither defendant Britt, nor anyone for him appeared in court. Motion was made by Appellee Gunn to dismiss the appeal. This motion was allowed and the appeal was dismissed with procedendo to the Justice of the Peace. After adjournment of the April Term, on August 22, 1940, during the July Term of said Court, Appellant Britt filed his motion to vacate the order of April 24, 1940, dismissing the appeal, and to reinstate the cause on the docket for trial. On August 27, 1940, Gunn filed his motion to strike the above motion. By agreement of the parties both motions were heard together. The Trial Court overruled plaintiff's motion to strike and sustained defendant's motion to vacate the order dismissing the appeal. This

left the case reinstated on the trial docket of the Circuit Court. From said order Appellee Gunn appealed to this court.

Upon consideration of the petition for rehearing in said cause we held that the order from which the appeal was taken was not a final, appealable order, and accordingly dismissed the appeal. This again reinstated the appeal from the Justice of the Peace court for trial in the Circuit Court. When the time for said trial came on Appellee Gunn moved the court to reconsider and to dismiss its order of August 27th, 1940, overruling its motion of April 24, 1940. Upon consideration by the trial court, it allowed said motion and set aside the order of August 27, 1940. This left the appeal dismissed with procedendo, and the judgment intact in the court of the Justice of the Peace.

In this action we think the court was quite within its rights, and upon a consideration of the record in the case we think the Court was fully justified in so acting. The facts in the case are fully set out in the former opinion.

The judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

FILED

MAR 2 1943

David J. Walker
CLERK OF THE APPELLATE COURT
FOURTH JUDICIAL DISTRICT ILLINOIS

Virginia

Abstract

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

FILED

MAR 2 1943

February Term, A. D. 1943

Samuel B. McCallister
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT ILLINOIS

Term No. 42024

Agenda No. 28

PEOPLE OF THE STATE OF ILLINOIS,
for the use of the COUNTY OF
POPE (IN THE STATE OF ILLINOIS)
a Municipal Corporation

Plaintiffs-Appellants

vs.

HARVEY G. MCCORMICK, ABRAHAM
BAKER, BARNEY PHELPS, JAMES P.
WILLIAMS, CHARLES DUFFEE, JAMES
O. MITCHELL, ANDY J. BELFORD,
EDGAR MODGLIN, JOHN M. RAUM, OLD
NICK WILLIS, BRUCE MCCAUGHN,
LOUIS P. KESTNER, WILLIAM E.
PARSON, FLONO HILL, WALTER
MCCORMICK, GEORGE ZIMMERS,
RAYMOND DAVIS, J. B. CHRIST,
GROVER E. HOLMES, JASPER W. HART,
CHARLES CULLETT, SHERMAN CRABB,
THEODORE SHELDON, JR., J. H.
DOUGLAS, JOHN W. PHELPS, RAYMOND
SIENER, RICK RAINS, JULIUS BRANDT,
ALBERT L. ROBBS, MARY MELLISA
MAYNOR, LEWIS A. HOKE, CRESSIE A.
RAGAN, JOHN STONE, CHRISTIAN D.
MCCORMICK, F. M. ROGERS, and THOS.
H. CLARK

Defendants-Appellees

318 I.A. 227²

Appeal from the
Circuit Court of
Pope County

STONE, J.

This is an appeal by Appellants, PEOPLE OF THE STATE OF ILLINOIS FOR THE USE OF THE COUNTY OF POPE, a Municipal Corporation, to reverse a judgment rendered in the Circuit Court of Pope County, dismissing the complaint as filed by Appellants. The complaint in this action is brought upon the bond of Harvey G. McCormick, as Sheriff and Ex Officio County Collector of Pope County, for failure to pay over to the County Treasurer, interest which he collected upon delinquent taxes, and, in the alternative,

to recover on such bonds for failure to comply with his duties and the conditions of the bonds in failing to collect interest on such delinquent taxes. The amended complaint consists of eight counts, the first four counts charging that the Collector collected and diverted to his own use the 1% per month interest on delinquent taxes provided for in Section 705, of Chapter 120, of the Illinois Revised Statutes, 1941, State Bar Association Edition. In the last four counts the Collector is charged with having failed and neglected to collect such one per cent, and in each particular count the bondsmen for the year covered thereby, were made defendants and were jointly charged with him on account of the delinquency set forth.

All of the defendants filed motion to strike the amended complaint, and set up as reasons for such motion, substantially that in such amended complaint there was a misjoinder of parties defendant, and a misjoinder of causes of action. The motion filed was to strike the entire complaint and did not refer to any particular counts. The Court sustained the motion to dismiss the amended complaint.

The questions involved in this case are substantially identical with those involved in People of the State of Illinois, for the use of the County of Pope, vs. Joe Shetler, et al., in which case opinion was filed at the present term, wherein the questions here raised were fully discussed and considered. The facts and the law in the ~~instant~~^{thus} case are governed by ~~that~~ case, and the reasoning of the Court and the conclusions reached there are applicable here. (For the reasons announced in that case,) the judgment of the Circuit Court of Pope County is reversed and the cause remanded with directions to overrule the motion to strike.

REVERSED AND REMANDED, WITH DIRECTIONS.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

Abstract

OCTOBER TERM, A. D. 1942.

Term No. 42039

Agenda No. 15

318 I.A. 228

VIOLA M. STEVENS,

Plaintiff-Appellant,

vs.

JOHNNY MOORE, doing business as
Johnny Moore Trucking Company,

Defendant-Appellee.

Appeal from the

Circuit Court of

Clay County

STONE, J.

This is an action for personal injuries sustained by Viola M. Stevens, appellant, who will be hereinafter referred to as plaintiff, against Johnny Moore, doing business as Johnny Moore Trucking Company, appellee, who will be hereinafter referred to as defendant. Plaintiff was a passenger in an automobile driven by Milderine George, who it is alleged also sustained injuries, and who joined in the complaint in the trial court, but who does not prosecute an appeal from the judgment of the lower court. On a trial of the cause by the court, without a jury, judgment was rendered in favor of defendant and against plaintiffs in bar of the action, and from this judgment Viola M. Stevens prosecutes her appeal to this court.

The complaint alleged in substance that while plaintiff was a guest in the Chevrolet Coupe driven by Milderine George, on June 20, 1940, and while in the exercise of due care, the driver attempted to pass the truck of defendant and that the said truck was carelessly, negligently and without warning driven by the agent of defendant to the left across the center line, crowding and forcing the car in which plaintiff was riding off the pavement, whereby the car became out of control and turned over, causing the injuries complained of.

Both plaintiff and Miss George testified that they were travelling west out of Xenia toward Salem, on Route 50, at about fifty miles an hour, with Miss George driving the car, that they followed defendant's truck for some distance, and then when they had passed the crest of a hill and were several blocks beyond, and had a clear view ahead, Miss George sounded her horn, and attempted to pass defendant's truck, which up to this time had been to the right of the center line, that without warning the truck drove over the line several feet to the left and their car was crowded off of the pavement.

The truck driver for defendant, Sam Camp or W. H. Campbell, who will be hereinafter designated as Sam Camp, and the man who accompanied him on the truck, Lum Boyetts, testified in substance that just after passing the crest of the hill, after following a Model T Ford, the driver of the truck sounded his horn, pulled out and went around this Ford. There was, so they testified, a Hayes Freight truck about 25 or 30 yards behind their truck. Camp testified that he did not see plaintiffs' coupe until he had pulled back on his side of the road, and they were on the shoulder, at that time.

Camp also testified that plaintiffs' car turned over about 30 or 40 yards behind his truck. Both Miss George and Miss Stevens deny the presence of the Model T Ford and the Hayes truck, upon the road at the time of the accident.

There appear to be minor discrepancies and inconsistencies in the testimony of Camp and Boyetts, but taking into consideration the fact that the accident happened on June 20, 1940, and the case was tried two years later, this was not surprising. Counsel for plaintiff strenuously and with the emphasis of frequent repetition claim that Camp was not the driver of defendant's truck and that the witness, Boyetts was not on the truck. We do not find anything in this record to justify this claim. Counsel in their brief admit that if the truck in question was pulling to the left over the



center line on the left side of the slab to pass another car at the instant the George coupe was pulling out to the left, to pass the truck, there can be no recovery.

Where there is a conflict in the testimony the reviewing court will not substitute its judgment for that of the trial court who heard and observed the witnesses as they testified on the trial. People vs. Overby, 362 Ill. 488; People vs. Partishuis 361 Ill. 178. In this case the court heard the evidence, and had the advantage or opportunity of judging of the weight to be given to the testimony of the two plaintiffs by their actions and demeanor while testifying, on the one hand and Camp and Boyetts on the other which this court did not have, and that finding is entitled to the same force and effect as the verdict of a jury. Wood vs. Price 46 Ill. 435; Field vs. Chicago and Rock Island Railroad Co. 71 id. 458; Podolski vs. Stone, 186 id. 540. We are not inclined to disturb this judgment as being against the manifest weight of the evidence.

It is contended on behalf of plaintiff, that the Court erred in not setting aside a stipulation entered into on the day of the trial and in not allowing plaintiff's motion for new trial on the ground of newly discovered evidence. The motion sets forth that it was untrue, as was stipulated, that Sam Camp was a duly authorized chauffeur or truck driver, under the laws of Illinois and that the truck in question was not legally licensed under the laws of Illinois. It was immaterial that defendant might have been violating a statute, unless it further appeared that such violation was the approximate cause of the injury complained of. Bux vs. Illinois Central R. Co. 229 Ill. App. 50; Flynn vs. Chicago City Ry. Co. 250 Ill. 460; Jeneary vs. C. & I. Traction Co. 306 id. 392. The further allegation is made that the party testifying as Sam Camp, was not at the accident as stipulated but no tangible proof is presented of this. Parties will not be relieved from stipulations in the absence of a clear showing that the matter stipulated is untrue, and then, only, when good cause is shown for grant-

ing the application. A stipulation by the parties as to the facts, as long as it stands, is conclusive between them and cannot be met by evidence tending to show that the facts are otherwise. City of Chicago vs. Drexel 141 Ill. 89; Ward and Co. vs. Industrial Com. 304 id. 576.

That part of plaintiff's motion for new trial devoted to the matter of newly discovered evidence, made, in the main, no showing of due diligence, and was merely cumulative. The granting of a new trial because of newly discovered evidence is largely a matter of discretion with the trial court. We are not inclined to hold that the court abused that discretion. For the reasons above stated the judgment of the lower court will be affirmed.

AFFIRMED.

FILED

MAR 8 1919

Samuel J. Mallitt

CLERK OF THE APPELLATE COURT
CHICAGO, ILL.

42327

PETER STEPHENS,

Appellee,

v.

RAILWAY EXPRESS AGENCY, INCORPORATED,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

318 I.A. 228²

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Peter Stephens filed a statement of claim in the Municipal Court of Chicago against the Railway Express Agency, Inc., a corporation, for damages to his restaurant building and its contents, when on March 13, 1940 the building was struck by defendant's truck. It is not disputed that the right rear wheel of the truck skidded into the side of the restaurant building. The amount of plaintiff's damages is the sole matter in dispute. The case was tried before the court and a jury, resulting in a verdict finding the defendant guilty and assessing plaintiff's damages at \$350. Judgment was entered, to reverse which this appeal is prosecuted.

Defendant complains that no competent testimony was adduced by the plaintiff to support the verdict; that there is no competent testimony on the damages, if any, sustained by plaintiff to his building; and that the trial court erroneously refused to admit proper evidence. Plaintiff asserts that competent testimony was produced to support the verdict; that there is competent testimony of the damages sustained; and that the trial court did not refuse to admit proper evidence offered by the defendant. Plaintiff owned and operated a restaurant at 939 South Wells Street, Chicago, which is at the northeast corner of Wells and Taylor Streets. He owned the frame building in which the restaurant was housed, but did not own the real estate. While working in his restaurant on the morning

PETER STEPHENS,

Appellee,

v.

RAILWAY EXPRESS AGENCY, INCORPORATED,
a corporation,

Appellant.

MR. PRESIDING JUSTICE SUCK DOLLER of the Circuit for the Court.

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Court of Chicago against the Railway Express Agency, Inc., a

corporation, for damages to his restaurant building and its contents

when on March 13, 1940 the building was struck by defendant's

truck. It is not disputed that the front wheel of the truck

skidded into the side of the restaurant building. The amount of

plaintiff's damages is the sole matter in dispute. The case was

tried before the court and a jury, resulting in a verdict finding

the defendant guilty and assessing plaintiff's damages at \$50.

Judgment was entered, to reverse which this appeal is prosecuted.

Defendant complains that no competent testimony was

adduced by the plaintiff to support the verdict; that there is

no competent testimony on the damages, if any, sustained by plain-

tiff to his building; and that the trial court erroneously refused

to admit proper evidence. Plaintiff asserts that competent testimony

was produced to support the verdict; that there is competent testimony

of the damages sustained; and that the trial court did not refuse

to admit proper evidence offered by the defendant. Plaintiff owned

and operated a restaurant at 939 North Ellis Street, Chicago, which

is at the northeast corner of Ellis and Taylor Streets. He owned

the frame building in which the restaurant was housed, but did not

own the real estate. While working in his restaurant on the morning

3181A.228

of March 13, 1940, he felt a tremendous shock to the building. The force of the blow caused the building to be pushed out of shape. A truck driven by one of defendant's drivers struck the building. After the collision the driver walked into the restaurant. He returned that afternoon to estimate the damage so that he could make a detailed report to his employer. Plaintiff called in a carpenter, who estimated the damage. There is a conflict in the testimony as to the extent of the damage. Defendant argues that circumstantial and other evidence of plaintiff and his witnesses demonstrate the improbability that the damages about which the witnesses testified, resulted from the collision. The carpenter who came to the premises shortly after the collision and who made an estimate as to the cost of making the repairs, was not hired to make the repairs. The evidence shows that repairs were made to the door, which was put in place by pushing the partition, and to the roof, which was covered with paper by plaintiff and his brother. The carpenter testified it would cost \$525 to do the necessary repair job. There is no doubt that the plaintiff is entitled to damages. There is a dispute as to the extent of the damage and the repairs necessary in order to restore the building. There was testimony that the force of the collision moved the building a few inches. Shelves fell down, and dishes, glasses and bottles were broken. In our opinion the evidence was sufficient to support the jury's finding that plaintiff suffered damages to the extent of \$350.

Defendant complains that on plaintiff's objection the court refused to allow the carpenter to answer the following question put to him on cross-examination: "All these things that you told him you would do for him, the condition of the building after you got through with it, if you had once done the work, would have been far improved over what it was the 13th of March; isn't that correct?"

of March 13, 1940, he felt a tremendous shock to the building. The force of the blow caused the building to be pushed out of shape. A truck driven by one of defendant's drivers struck the building. After the collision the driver walked into the restaurant. He returned that afternoon to estimate the damage so that he could make a detailed report to his employer. Plaintiff called in a carpenter, who estimated the damage. There is a conflict in the testimony as to the extent of the damage. Defendant argues that circumstantial and other evidence of Plaintiff and his witnesses demonstrate the improbability that the damage about which the witnesses testified, resulted from the collision. The carpenter who came to the premises shortly after the collision and who made an estimate as to the cost of making the repairs, was not hired to make the repairs. The evidence shows that repairs were made to the door, which was put in place by pushing the partition, and to the roof, which was covered with paper by Plaintiff and his brother. The carpenter testified it would cost \$25 to do the necessary repairs. There is no doubt that the Plaintiff is entitled to damages. There is a dispute as to the extent of the damage and the repairs necessary in order to restore the building. There was testimony that the force of the collision moved the building a few inches. Shelves fell down, and dishes, glasses and bottles were broken. In our opinion the evidence was sufficient to support the jury's finding that Plaintiff suffered damages to the extent of \$300. Defendant complains that on Plaintiff's objection the court refused to allow the carpenter to answer the following question put to him on cross-examination: "All these things that you told him you would do for him, the condition of the building after you got through with it, if you had once done the work, would have been far improved over what it was the 13th of March; isn't that correct?"

Defendant now states that the intent of this question was to ask the witness whether the building would be more valuable after the proposed repairs were made than it was prior to the accident. The objection to the question was that it called for a conclusion. After the court sustained the objection there was no statement to the court as to the purpose of asking the question. We are of the opinion that neither from the question nor the objection to it would the court understand that the purpose of the question was to ascertain from the witness whether the building would be more valuable after the proposed repairs had been made than it was prior to the accident. Furthermore, the witness was a carpenter and it does not appear that he was qualified as an expert as to the value of real estate or buildings. The defendant did not offer any evidence as to values.

We are satisfied that substantial justice has been done and the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND KILEY, JJ. CONCUR.

Defendant now states that the object of this question was to ask the witness whether the building would be more valuable after the proposed repairs were made than it was prior to the accident. The objection to the question was that it called for a conclusion. After the court sustained the objection there was no statement to the court as to the purpose of asking the question. In one of the opinions that neither from the question nor the objection to it would the court understand that the purpose of the question was to ascertain from the witness whether the building would be more valuable after the proposed repairs had been made than it was prior to the accident. Furthermore, the witness was a carpenter and it does not appear that he was qualified as an expert as to the value of real estate or buildings. The defendant did not offer any evidence as to value.

It is stated that substantial justice has been done and the judgment of the Municipal Court of Chicago is affirmed.

REBECCAH A. SILEY, J.

REBECCAH A. SILEY, J., CONCURS.

NICIE MAE NICHOLS and CHARLES JOHNSON,

Appellees,

v.

COMMERCIAL TRUCKERS, a corporation,

Appellant,

and

BLUE RIBBON BREW DISTRIBUTING COMPANY,
a corporation,

Defendant.

APPEAL FROM

CIRCUIT COURT

318 I.A. 229

COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Nicie Mae Nichols and Charles Johnson filed a complaint in the Circuit Court of Cook County against Blue Ribbon Brew Distributing Company, a corporation, Commercial Truckers, a corporation, and William Flood to recover damages for personal injuries suffered by both plaintiffs on November 29, 1940, and also for damages to an automobile owned by plaintiff Johnson. Nicie Mae Nichols asked judgment for \$25,000 and Charles Johnson for \$3,000. Issue was joined and the case was tried before the court and a jury. By agreement, the defendant William Flood was dismissed from the case. The jury returned a verdict in favor of Nicie Mae Nichols and against Commercial Truckers, a corporation, for \$10,000; in favor of Charles Johnson and against Commercial Truckers, a corporation, for \$400; and in favor of Charles Johnson and against Blue Ribbon Brew Distributing Company, a corporation, for \$100. Motions by defendant, Commercial Truckers, a corporation, for a directed verdict, for judgment notwithstanding the verdict, and in the alternative for a new trial, were overruled, and the court entered judgment on the verdict. Defendant, Commercial Truckers, a corporation, appeals.

At the time of the trial Nicie Mae Nichols was 31 years of age. She was living in Chicago with her sister, Ruth Nichols Carter, who, on Thursday November 28, 1940, was in Milwaukee. On that evening Miss Nichols, from Chicago, called her sister Ruth at Milwaukee, by

NICOLEE MAE NICHOLS and CHARLES JOHNSON

Appellants,

v.

COMMERCIAL TRUCKERS, a corporation,

Appellee,

and

BLUE RIBBON NEWS DISTRIBUTING COMPANY, a corporation,

Defendant.

MAILED FROM

U.S. DIST. COURT

313-1-229

COOK COUNTY

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court.

Nicolee Mae Nichols and Charles Johnson filed a complaint

in the Circuit Court of Cook County against Blue Ribbon News

Distributing Company, a corporation, Commercial Truckers, a corporation,

and William Flood to recover damages for personal injuries suffered

by both plaintiffs on November 28, 1940, and also for damages to an

automobile owned by plaintiff Johnson. Nicolee Mae Nichols asked

judgment for \$25,000 and Charles Johnson for \$5,000. Issues were joined

and the case was tried before the court and a jury. Verdict, against

the defendant William Flood was dismissed from the case. The jury

returned a verdict in favor of Nicolee Mae Nichols and against

Commercial Truckers, a corporation, for \$10,000; in favor of Charles

Johnson and against Commercial Truckers, a corporation, for \$400;

and in favor of Charles Johnson and against Blue Ribbon News Dis-

tributing Company, a corporation, for \$10,000, damages by defendant,

Commercial Truckers, a corporation, for a directed verdict, for

judgment notwithstanding the verdict, and in the alternative for

new trial, were overruled, and the court entered judgment on the

verdict. Defendant Commercial Truckers, a corporation, appeals.

At the time of the trial Nicolee Mae Nichols was 31 years

of age. She was living in Chicago with her sister, Ruth Nichols, later,

who, on Thursday November 28, 1940, was in Milwaukee. On that evening

Nicolee Nichols, from Chicago, called her sister Ruth at Milwaukee, by

long distance telephone. The plaintiff, Charles Johnson, owned a 1940 model Buick sedan automobile. It was decided to go to Milwaukee in his automobile for the purpose of bringing Mrs. Carter back to Chicago. They took George House along with them. Johnson drove and Miss Nichols sat alongside of him on the front seat. House sat in the rear seat. They left the south side of Chicago at about 8:30 p.m. The car was driven to Milwaukee over Route 41, known as Skokie Highway. On the way to Milwaukee, House relieved Johnson in driving the car. They picked up Mrs. Carter at a place known as the 711 Club in Milwaukee. They started on the return trip to Chicago at about 1:00 a. m. Friday, November 29. House drove the car out of Milwaukee on the way back and Johnson sat alongside of him on the front seat. The two girls sat on the rear seat. They decided to drive back to Chicago via the same road, namely, Route 41. When they were about 35 miles from Milwaukee the car was stopped and House changed to the rear seat, where he sat with Mrs. Carter, and Miss Nichols moved to the front seat. Johnson then resumed driving. All of the witnesses agree that the highway was extremely slippery. The occurrence which gave rise to plaintiffs' action happened on Route 41, a short distance south of Oakton Street in the Village of Skokie, and approximately at a railroad viaduct which crosses Skokie Highway. Skokie Highway is a wide road, having four traffic lanes, running north and south, Oakton Street runs east and west. There are traffic control lights at the intersection of Oakton Street and Skokie Highway, and they were in operation at the time the Johnson car arrived there at about 3:40 a. m. Johnson, the driver, testified that when the car reached the intersection the traffic light directing north and southbound traffic was red, and he stopped his car. When the light changed to green he started the car. The headlights on the automobile were lighted. There were two lanes for southbound traffic and two

long distance telephone. The plaintiff, Charles Johnson, owned a 1940 model Buick sedan automobile. It was desired to go to Milwaukee in his automobile for the purpose of bringing Mrs. Carter back to Chicago. They took George Jones along with them. Johnson and Miss Nichols sat alongside of him on the front seat. House sat in the rear seat. They left the south side of Chicago at about 8:30 p.m. The car was driven to Milwaukee over Route 41, known as Skokie Highway. On the way to Milwaukee, House relieved Johnson in driving the car. They picked up Mrs. Carter at a place known as the 711 Club in Milwaukee. They started on the return trip to Chicago at about 1:00 a.m. Friday, November 29. House drove the car out of Milwaukee on the way back and Johnson sat alongside of him on the front seat. The two girls sat on the rear seat. They decided to drive back to Chicago via the same route, namely, Route 41. When they were about 24 miles from Milwaukee the car was stopped and House changed to the rear seat, where he sat with Mrs. Carter, and Miss Nichols moved to the front seat. Johnson then resumed driving. All of the witnesses agree that the highway was extremely slippery. The occurrence which gave rise to plaintiff's action happened on Route 41, a short distance south of Oakton Street in the Village of Skokie, and approximately at a railroad viaduct which crosses Skokie Highway. Skokie Highway is a wide road, having four travel lanes, running north and south. Oakton Street runs east and west. There are traffic control lights at the intersection of Oakton Street and Skokie Highway, and they were in operation at the time the Johnson car arrived there at about 3:40 a.m. Johnson, the driver, testified that when the car reached the intersection the traffic light directing north and southbound traffic was red, and he stopped his car. When the light changed to green he started the car. The headlights on the automobile were lighted. There were two lanes for southbound traffic and two

for northbound traffic, being separated by a white line. He was driving south in the west lane. The car crossed the intersection, and while in second speed started to skid. It was then moving at a speed of 10 or 11 miles an hour. It was skidding in a southeasterly direction and came almost to a stop on the east side of the northbound section of Skokie Highway. Johnson succeeded in stopping the car. The car was then facing in a southeasterly direction. At this time a truck owned by defendant, Blue Ribbon Brew Distributing Company, was approaching from the south and proceeding in a northerly direction. Johnson saw the lights of the approaching truck. He blew the horn and signaled the approaching truck with his lights. The truck struck the Johnson automobile, spinning it around and knocking it back to the west side of the highway, where it came to a stop. The Johnson automobile was then facing in a northeasterly direction with its headlights shining to the north. Plaintiffs' testimony was that while Johnson's car was in that position, a southbound truck on Skokie Highway hit their car a glancing blow, continued on across the highway and came to rest on the east side of the highway, partially off the highway and facing in a southeasterly direction. This truck was owned by Commercial Truckers, a corporation. Further testimony on behalf of plaintiffs was that another southbound truck owned by William Flood ran into their car, pushing it to the south and causing considerable damage. At the point of the occurrence, the highways were so slippery that people were unable to walk thereon without falling down, and even the police squad car and ambulance which appeared on the scene had difficulty in moving. Johnson was thrown out of the car and rendered unconscious. Miss Nichols was propelled through the right hand door by the force of the impact. An ambulance conveyed the plaintiffs to the St. Francis Hospital at Evanston. She suffered a compound fracture of the left tibia, with pieces of silk stocking caught between the fragments of the bone. A large piece of skin estimated at between 12 and 14 inches by 6

A large piece of skin estimated at between 12 and 14 inches by 6 with pieces of silk sticking caught between the fragments of the bone at Evanston. She suffered a compound fracture of the left tibia. An ambulance conveyed the plaintiff to the St. Francis Hospital. Propelled through the right hand door by the force of the impact. Miss Nichols was thrown out of the car and rendered unconscious. Johnson was which appeared on the scene had difficulty in moving. Johnson was without falling down, and even the police found car and ambulance highways were so slippery that people were unable to walk thereon and causing considerable damage. At the point of the occurrence, the owned by William Flood ran into their car, pushing it to the south testimony on behalf of plaintiff was that another southbound truck This truck was owned by Commercial Trucking, a corporation. Further partially off the highway and facing in a southeasterly direction. on across the highway and came to rest on the east side of the highway, truck on Skokie Highway hit their car a glancing blow, continued was that while Johnson's car was in that position, a southbound with its headlights shining to the north. Plaintiff's testimony Johnson automobile was then facing in a northeasterly direction back to the west side of the highway, where it came to a stop. The struck the Johnson automobile, spinning it around and knocking it and signaled the approaching truck with his lights. The truck Johnson saw the lights of the approaching truck. He blew the horn was approaching from the south and proceeding in a northerly direction. a truck owned by defendant, Miss Nichols Distributing Company, The car was then facing in a southeasterly direction. At this time section of Skokie Highway. Johnson succeeded in stopping the car. direction and came almost to a stop on the east side of the northbound a speed of 10 or 11 miles an hour. It was skidding in a southeasterly and while in second speed started to skid. It was then moving at driving south in the west lane. The car crossed the intersection, for northbound traffic, being separated by a white line. He was

inches was missing. She had multiple injuries to her chest and her head was bruised. She was given an injection of blood plasma. A skin grafting operation was performed, the skin being obtained from her right thigh and applied to the open wound on her leg. A good deal of the muscle of the leg had been ripped away. An operation was performed consisting of the removal of the foreign material from the wound, cutting away the muscle tissue which had been ripped, trimming the skin edges and putting a plate in her leg to hold the fracture in position. Her right thigh is covered with scars from her knee to the hip bone. An examination disclosed that Johnson suffered the fracture of ribs on the left side.

Jennings H. Stauss, the driver of the truck owned by the Commercial Truckers, a corporation, testified that he was driving south on Skokie Highway. The traffic signal light at Oakton Street was red and he stopped. There was no traffic ahead. He testified that the Johnson automobile passed him up and that as it proceeded south and reached a turn in the highway it went into a skid and skidded across the center line of the highway and into the truck of the Blue Ribbon Brew Distributing Company; and that after striking the Blue Ribbon truck, the Johnson car spun around and was knocked over to the west side of the highway directly into the path of witness's truck. Witness further testified that he was driving at approximately 15 miles an hour against the west curb of Skokie Highway, the purpose of driving close to the curb being to prevent skidding; that the Johnson car was catapulted in front of his truck so suddenly that in pulling over to the left to try to avoid striking the Johnson car, his truck struck that car a glancing blow and finally came to a stop on the east side of the highway. Defendant, Commercial Truckers, a corporation, also contends that after the impact, the truck of William Flood, coming in a southerly direction, came at such a rapid speed that its driver was unable to control it and that it crashed into the Johnson automobile,

inches was missing. She had multiple injuries to her chest and her head was bruised. She was given an injection of blood plasma. A skin grafting operation was performed, the skin being obtained from her right thigh and applied to the open wound on her leg. A good deal of the muscle of the leg had been ripped away. An operation was performed consisting of the removal of the foreign material from the wound, cutting away the muscle tissue which had been ripped, trimming the skin edges and putting a plate in her leg to hold the fracture in position. Her right thigh is covered with scars from her knee to the hip bone. An examination disclosed that Johnson suffered the fracture of ribs on the left side.

Jennings H. Starnes, the driver of the truck owned by the Commercial Truckers, a corporation, testified that he was driving south on Okla. Highway. The traffic signal light at Oklahoma Street was red and he stopped. There was no traffic ahead. He testified that the Johnson automobile passed him up and that as it proceeded south and reached a turn in the highway it went into a skid and skidded across the center line of the highway and into the truck of the Blue Ribbon Brew Distributing Company; and that after striking the Blue Ribbon truck, the Johnson car spun around and was knocked over to the west side of the highway directly into the path of witness's truck. Witness further testified that he was driving at approximately 15 miles an hour against the west curb at Okla. Highway, the purpose of driving close to the curb being to prevent skidding; that the Johnson car was catapulted in front of his truck so suddenly that in order to avoid collision he was forced to turn the Johnson car, his truck struck that car a glancing blow and finally came to a stop on the east side of the highway. Witness, Commercial Truckers, a corporation, also testified that after the impact, the truck of William Hood, coming in a southerly direction, came at such a rapid speed that its driver was unable to control it and that it crashed into the Johnson automobile.

The following instruction tendered by defendant, Blue Ribbon Brew Distributing Company, a corporation, was refused:

"The Court instructs you that if you believe from the evidence, under the instructions of the court, that the injury to the plaintiffs was the result of a mere accident which occurred without negligence on the part of the defendant, Blue Ribbon Distributing Company, a corporation, you should return a verdict of not guilty as to the defendant, Blue Ribbon Brew Distributing Company, a corporation."

The following instruction tendered by the defendant, Commercial Truckers, a corporation, was refused:

"If you find from the evidence that the plaintiffs' injuries were the result of an accident caused without any negligence on the part of the defendants you should return a verdict of not guilty."

Appellant does not contend that it has a right to complain of the court's refusal to give the instruction offered on behalf of the other corporate defendant, and asserts that the instruction which it offered and which the court refused to give, was a stock instruction and that it should have been given in view of the fact that all the drivers involved in the collision were confronted with the same condition caused by the icy pavement. This defendant insists that the instruction should have been given as there was evidence that the collision and the consequent injuries was the result of an unavoidable accident caused by the elements. In Chandler v. Illinois Central Railroad Co., 177 Ill. App. 240, one of the errors assigned was the court's refusal to give instructions similar to the one tendered by appellant. The court said (251):

"These two instructions or these in both substance and general form, are frequently asked in cases of this class and sometimes given, and there are a few cases holding that it is an error to give them, but we know of no case in which it has been held error to refuse them or either of them."

In Gordon v. Current, 263 Ill. App. 435, the court held that the refusal to give an instruction denying recovery in case the injury complained of was the result of a mere accident was not error when the jury was instructed that before the plaintiff could recover he

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Ribbon Brew Distributing Company, a corporation, was refused:

"The Court instructs you that if you believe from the evidence, under the instructions of the Court, that the injury to the plaintiff was the result of a mere accident which occurred without negligence on the part of the defendant, Blue Ribbon Brew Distributing Company, a corporation, you should return a verdict of not guilty as to the defendant, Blue Ribbon Brew Distributing Company, a corporation."

The following instruction tendered by the defendant, Commercial

Truckers, a corporation, was refused:

"If you find from the evidence that the plaintiff's injuries were the result of an accident caused without any negligence on the part of the defendant, you should return a verdict of not guilty."

Appellant does not contend that it has a right to complain of the court's refusal to give the instruction offered on behalf of the other corporate defendant, and asserts that the instruction which it offered and which the court refused to give, was a stock instruction and that it should have been given in view of the fact that all the drivers involved in the collision were confronted with the same condition caused by the icy pavement. This defendant insists that the instruction should have been given as there was evidence that the collision and the consequent injuries was the result of an unavoidable accident caused by the pavement. In Shanley v. Illinois Central Railroad Co., 177 Ill. App. 240, one of the errors assigned was the court's refusal to give instructions similar to the one tendered by appellant. The court said (241):

"These two instructions or those in both substance and general form, are frequently given in cases of this class and are given, and there are a few cases holding that it is an error to give them, but we know of no case in which it has been held error to refuse them or either of them."

In Gordon v. Current, 263 Ill. App. 433, the court held that the refusal to give an instruction denying recovery in case the injury complained of was the result of a mere accident was not error when the jury was instructed that before the plaintiff could recover he

must prove that the injury was caused by the carelessness or negligence of the defendant, and that plaintiff was exercising due care and caution for his own safety. We have examined the record and find that the jury was instructed that it was necessary for plaintiffs to prove by a preponderance of the evidence that the defendant was guilty of negligence, and that they, plaintiffs, were in the exercise of due care and caution for their own safety. An instruction given at the request of appellant informed the jury that "Commercial Truckers cannot be held liable to the plaintiffs, or either of them, for any act of negligence not committed by it or its agents, and if you believe from the evidence that the negligence, if any, which caused the injuries in question was the negligence of some person who was not the agent or representative of said defendant, Commercial Truckers, then you should find said defendant, Commercial Truckers, not guilty." Another instruction given on request of appellant reads:

"If you believe from the evidence, under the instructions of the court, that the plaintiffs were suddenly and without any negligence on the part of the defendants, placed in a position of danger, then in order to charge the defendants with the duty to avoid the collisions and injuries, the plaintiffs must show by a preponderance of the evidence that the circumstances were such that the said defendants at the time or times in question, had opportunity to become conscious, by the exercise of ordinary care, of the facts giving rise to such duty and each a reasonable opportunity to perform it."

The jury was fully informed that before they could find appellant guilty it was necessary for the plaintiff to prove by a preponderance of the evidence that the collision was caused by the negligence of appellant's driver and that plaintiffs were in the exercise of due care and caution for their own safety. Appellant was not harmed by the refusal of the court to give the requested instruction, and the Court did not err in so ruling.

Appellant maintains that the verdicts are inconsistent and cannot stand. The jury returned a verdict in favor of plaintiff Charles Johnson against the Blue Ribbon Brew Distributing Company, a corporation, for \$100, and against Commercial Truckers, a corporation, for \$400. This defendant insists that the jury had no right to

must prove that the injury was caused by the negligence or negligence of the defendant, and that plaintiff was exercising due care and caution for his own safety. We have examined the record and find that the jury was instructed that it was necessary for plaintiff to prove by a preponderance of the evidence that the defendant was guilty of negligence, and that they, plaintiff, were in the exercise of due care and caution for their own safety. In instruction given at the request of appellant informed the jury that "Commercial Truckers cannot be held liable to the plaintiff, or either of the, for any act of negligence not committed by it or its agents, and if you believe from the evidence that the negligence, if any, which caused the injuries in question was the negligence of some person who was not the agent or representative of said defendant, Commercial Truckers, then you should find said defendant, Commercial Truckers, not guilty." Another instruction given on request of appellant reads: "If you believe from the evidence, under the instructions of the court, that the plaintiff were negligently and without any negligence on the part of the defendant, placed in a position of danger, then in order to charge the defendant with the duty to avoid the collisions and injuries, the plaintiff must show that preponderance of the evidence that the circumstances were such that the said defendant at the time or times in question, had a opportunity to become conscious, by the exercise of ordinary care, of the facts giving rise to such duty and such a reasonable opportunity to perform it."

The jury was fully informed that before they could find appellant guilty it was necessary for the plaintiff to prove by a preponderance of the evidence that the collision was caused by the negligence of appellant's driver and that plaintiff was in the exercise of due care and caution for their own safety. Appellant was not harmed by the refusal of the court to give the requested instruction, and the Court did not err in so ruling.

Appellant maintains that the verdict was inconsistent and cannot stand. The jury returned a verdict in favor of plaintiff Charles Johnson against the "The Union Free Distilling Company," a corporation, for \$100, and against Commercial Truckers, a corporation, for \$400. This defendant insists that the jury had no right to

divide and apportion the liability, and that the verdict to be good at all should have been against both defendants in the sum of \$500, or against one defendant for \$500. Appellant also states that to be consistent, the jury should have found against the Blue Ribbon Brew Distributing Company in the claim of Miss Nichols. This defendant does not cite any authorities to support its contention. The various collisions were not simultaneous, but successive. There was no relationship between the defendants. The action of the jury, while unusual, does not in itself warrant the setting aside of the verdicts.

Appellant urges that the court erred in refusing the defendant the right to fully cross-examine the plaintiff Charles Johnson. The attorney for the Blue Ribbon Brew Distributing Company in cross-examining Johnson brought out that he knew Miss Nichols for about five years prior to the accident; that as far as he knew she was not married; that at the time of the accident the witness was unmarried; that his wife had died about two months before; that the witness lived at 447 East 48th Place, Chicago; that he lived with his wife prior to the time she passed away; that after she died he lived with a man named James Morris; that witness had a "couple of children"; that one of them lived with him at the time of the trial and two of the children lived with the "grandmother". The attorney for the Commercial Truckers then undertook to cross-examine this witness. This attorney asked the witness: "Who else lives with you at 447 East 48th now?" The court sustained an objection. Asked, "Are you still at the same address as you were before your wife died?", witness answered, "Yes". He was then asked: "You don't live alone there now, do you?" An objection was interposed by plaintiffs and the proposition was discussed out of the presence of the jury. The trial judge stated that the only effect of requiring an answer would be to create a prejudice against the plaintiffs and that the answer would not have any bearing upon the

divide and apportion the liability, and that the verdict to be given at all should have been against both defendants in the sum of \$500, or against one defendant for \$500. Appellant also states that to be consistent, the jury should have found against the Blue Ribbon Brew Distributing Company in the claim of Miss Nichols. This defendant does not cite any authorities to support its contention. The various collisions were not simultaneous, but successive. There was no relationship between the defendants. The action of the jury, while unusual, does not in itself warrant the setting aside of the verdict.

Appellant urges that the court erred in releasing the defendant the right to fully cross-examine the plaintiff Charles Johnson. The attorney for the Blue Ribbon Brew Distributing Company in cross-examining Johnson brought out that he knew Miss Nichols for about five years prior to the accident; that as far as he knew she was not married; that at the time of the accident the witness was unmarried; that his wife had died about two months before; that the witness lived at 447 East 43rd Street, Chicago; that he lived with his wife prior to the time she became widowed; that after she died he lived with a man named James Morris; that witness had a "couple of children"; that one of them lived with him at the time of the trial and two of the children lived with the "grandmother". The attorney for the Commercial Truckers then undertook to cross-examine this witness. This attorney asked the witness: "Did you ever live with you at 447 East 43rd now?" The court sustained an objection. Asked, "Are you still at the same address as you were before your wife died?" witness answered, "Yes". He was then asked: "You don't live alone there now, do you?" an objection was interposed by plaintiff and the proposition was discussed out of the presence of the jury. The trial judge stated that the only effect of requiring an answer would be to create a prejudice against the plaintiff and that the answer would not have any bearing upon the

important facts of the lawsuit. The attorney for appellant then stated that his purpose was not to show that either plaintiff was an adulterer, but to reflect on the witness's credibility. This attorney stated that from the testimony given by the witness the jury would believe that the witness was living with a man named Morris, which was not the fact. The court then stated that he would permit counsel to ask the witness "if Mr. Morris is living there now and stop at that". Attorney for the appellant then stated that he would like to show by further cross-examination that Johnson, Miss Nichols, Mrs. Carter and House were living in the same apartment. In the presence of the jury the witness was then asked as to whether Morris was still living with him at the address, and the witness answered in the negative. Appellant asserts that the purpose of the cross-examination was not to show any improper relations between any of the parties, but to show that they were living under a common roof, were at home together during the trial, and left together each morning. It will be observed that the first questions as to Johnson's family life were asked by the attorney for the defendant Blue Ribbon Brew Distributing Company. The extent to which cross-examination of a witness may go rests largely within the discretion of the trial judge. We are of the opinion that in declining to permit appellant to cross-examine Johnson in the manner in which appellant was endeavoring to do, the trial judge exercised a wise discretion.

Finally, appellant argues that the verdict is contrary to the manifest weight of the evidence and is not supported by any credible testimony. We do not believe that any good purpose will be served by analyzing and comparing the testimony of the various witnesses. We find there was sufficient competent evidence to warrant the jury in returning a verdict finding the appellant guilty. Perceiving no error, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND KILEY, JJ. CONCUR.

important facts of the lawsuit. The attorney for appellant then stated that his purpose was not to show that either of the witnesses was an adulterer, but to reflect on the witness's credibility. This attorney stated that from the testimony given by the witness the jury would believe that the witness was living with a man named Morris, which was not the fact. The court then stated that he would permit counsel to ask the witness "if Mr. Morris is living there now and stop at that". Attorney for the appellant then stated that he would like to show by further cross-examination that Johnson, Mrs. Carter and House were living in the same apartment. In the presence of the jury the witness was then asked as to whether Morris was still living with him at the address, and the witness answered in the negative. Appellant asserts that the purpose of the cross-examination was not to show any improper relations between any of the parties, but to show that they were living under a common roof, were at home together during the trial, and left together each morning. It will be observed that the first question as to Johnson's family life was asked by the attorney for the defendant the day before the trial. Company. The extent to which cross-examination of a witness may go rests largely within the discretion of the trial judge. He is of the opinion that in declining to permit appellant to cross-examine Johnson in the manner in which appellant was endeavoring to do, the trial judge exercised a wise discretion. Finally, appellant argues that the verdict is contrary to the manifest weight of the evidence and is not supported by any credible testimony. We do not believe that any good purpose will be served by analyzing and comparing the testimony of the various witnesses. We find there was sufficient competent evidence to warrant the jury in returning a verdict finding the defendant guilty. Leaving no error, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

H. ELL AND KIRBY, JR. COUNSEL.

42224

RALPH C. McCOY,

Appellant,

v.

HY-G CORPORATION, a corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

318 I.A. 229²

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from an order of the Municipal Court of Chicago by which a default judgment was vacated and summons quashed.

It appears from the record, as suggested by the plaintiff, that on August 12, 1941 this suit was filed to recover \$190 claimed by the plaintiff as attorney's fees. The bailiff, on August 13, 1941, served summons upon the company by leaving a true copy thereof, together with praecipe and statement of claim, with "Joseph Gould, an agent of said defendant, found in the City of Chicago", returnable August 25, 1941.

Judgment was rendered on August 25, 1941 by default for want of appearance, for \$190. Execution was issued on this judgment on August 29, 1941, with like service upon "Joseph Gould, an agent of said corporation on September 2, 1941", which was returned "no property found and no part satisfied" on September 9, 1941.

Plaintiff filed a creditor's bill upon the judgment on September 18, 1941, and Louis C. Rappaport was appointed receiver for the company on October 2, 1941 in the Superior Court of Cook County, and qualified and acted as such, and about October 1, 1941 took possession of the records, books, and seal from Joseph Gould who as stated by the plaintiff claimed to be the secretary of the corporation. Plaintiff states that on November 4, 1941 the receiver sent notice to Lucille H. Jones, president, and John Paul Jones, her husband, vice president and treasurer of the company,

RALPH C. BOOBY,

Plaintiff,

v.

HY-G CORPORATION, a corporation,

Defendant.

MR. JUSTICE REED DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from an order of the Municipal Court of Chicago by which a default judgment was vacated and summons quashed.

It appears from the record, as suggested by the plaintiff, that on August 12, 1941 this suit was filed to recover 120 claimed by the plaintiff as attorney's fees. The writ, on August 12, 1941, served summons upon the company by leaving a true copy thereof, together with precept and statement of claim, with "Joseph Gould, an agent of said defendant, found in the City of Chicago," returnable August 22, 1941.

Judgment was rendered on August 22, 1941 by default for want of appearance, for 120. Execution was issued on this judgment on August 22, 1941, with like service upon "Joseph Gould, an agent of said corporation on September 2, 1941," which was returned "no property found and no part satisfied" on September 2, 1941.

Plaintiff filed a creditor's bill upon the judgment on September 18, 1941, and Louis G. Wapner was appointed receiver for the company on October 2, 1941 in the Superior Court of Cook County, and qualified and acted as such, and about October 1, 1941 took possession of the records, books, and seal from Joseph Gould who as stated by the plaintiff claimed to be the secretary of the corporation. Plaintiff states that on November 4, 1941 the receiver sent notice to Lucille E. Jones, president, and John Paul Jones, her husband, vice president and treasurer of the company,

who resided in Evanston, advising them of his appointment and requesting the assets, books and records of the company be turned over to him.

It appears that the company was the owner of an Application for Patent on a douche bag which was claimed by the Joneses to have a potential value because of an alleged royalty contract with Roycemore Toiletries, Inc, but here suggested to be of no value because the royalty contract was wholly optional and because all claims under the patent application had been rejected by the United States Patent Office on more than one occasion. Application was made to the Superior Court to sell this patent application right. The Joneses were present in court with their counsel when the court heard the petition to sell the patent claim; also the chief stockholders were there; and all appeared in person and objected to the sale, but filed no appearance in the cause. It is said that the defendant corporation appeared specially in this cause for the purpose of objecting to the jurisdiction of the court to enter the judgment against it, and to have the judgment expunged from the records as being void, and it appears from the statement of the plaintiff that the substance of the grounds found in defendant's petition to vacate may be stated as follows: (1) that the service of process was not had upon an agent of the company nor upon one authorized to receive process for the company; that Joseph Gould, who was served with process as an agent of the company, had been removed as secretary of the company on February 10, 1941, and that Ralph C. McCoy, plaintiff, was elected secretary in place of Joseph Gould on February 10, 1941; and (2) that plaintiff organized the company and was its attorney at the time suit was brought and that a fiduciary relationship existed between plaintiff and the company and its officers; and that the plaintiff had been paid for his services rendered to the company.

who resided in Vanston, advising him of his appointment and requesting the assets, books and records of the company be turned over to him.

It appears that the company was the owner of an Application for Patent on a douche bag, which was claimed by the Joneses to have a potential value because of an alleged royalty contract with Roycemore Toilettries, Inc., but have suggested to be of no value because the royalty contract was wholly optional and because all claims under the patent application had been rejected by the United States Patent Office on more than one occasion. Application was made to the Superior Court to sell this patent application right. The Joneses were present in court with their counsel. The court heard the petition to sell the patent claim; also the chief stockholders were there; and all appeared in person and objected to the sale, but filed no appearance in the court. It is said that the defendant corporation appeared specially in this cause for the purpose of objecting to the jurisdiction of the court to enter the judgment against it, and to have the judgment set aside from the records as being void, and it appears from the statement of the plaintiff that the substance of the grounds found in defendant's petition to vacate may be stated as follows: (1) that the service of process was not had upon any agent of the company nor upon one authorized to receive process for the company; that Joseph Gould, who was served with process as an agent of the company, had been removed as secretary of the company on February 10, 1941, and that Ralph C. McCoy, plaintiff, was elected secretary in place of Joseph Gould on February 10, 1941; and (2) that plaintiff organized the company and was its attorney at the time it was brought and that a fiduciary relationship existed between plaintiff and the company and its officers; and that plaintiff had been paid for his services rendered to the company.

The theory of the plaintiff on this appeal is that the service of process was good upon Joseph Gould who was a stockholder, director and secretary of the company; that the appearance being special for the purpose of questioning the jurisdiction of the court no other question than that of service was relevant or material, and that the rights of third persons, taken under the judgment, having intervened, the judgment should not have been disturbed.

The theory of the defendant, on the other hand, is that the service of process was void, on the ground that Joseph Gould was not the secretary of the company at the time of the service of process, notwithstanding that he was a director and stockholder of the company; that the merits of the case were open for proof; that the company was not indebted to plaintiff; and that a fiduciary relationship existed between plaintiff, the company, and its officers.

It appears that the Hy-G Corporation was organized under the laws of Illinois in April 1939; there were six or seven stockholders among whom were Lucille H. Jones who was said to be the principal stockholder, owning about sixty-five per cent of the stock, and Joseph Gould who owned twenty shares of the 200 outstanding shares. The directors of the corporation were Lucille H. Jones, John Paul Jones, her husband, and Joseph Gould. The officers of the company originally elected Lucille H. Jones president and treasurer, John Paul Jones vice president, and Joseph Gould secretary. At the time the corporation was organized the offices of the company were at 11 South La Salle street in plaintiff's office. Both John Paul Jones and Joseph Gould officed with plaintiff until November 1, 1939 when plaintiff moved his office to 105 West Madison street. The books, records and seal of the corporation had been kept in the office vault. When plaintiff moved to his new office Joseph Gould went elsewhere and took the books, records and seal with him. Gould thereafter turned them over to the receiver.

The theory of the plaintiff on this point is that the service of process was good upon Joseph Gould who was a stockholder, director and secretary of the company; that the same being special for the purpose of questioning the jurisdiction of the court no other question than that of service was relevant or material, and that the rights of third persons, taken under the judgment, having intervened, the judgment should not have been disturbed. The theory of the defendant, on the other hand, is that the service of process was void, on the ground that Joseph Gould was not the secretary of the company at the time of the service of process, notwithstanding that he was a director and stockholder of the company; that the merits of the case were open for proof; that the company was not indebted to plaintiff; and that a fiduciary relationship existed between plaintiff, the company, and its officers. It appears that the H-G Corporation was organized under the laws of Illinois in April 1933; there were six or seven stockholders among whom were Lucille H. Jones who was said to be the principal stockholder, owning about sixty-five per cent of the stock, and Joseph Gould who owned twenty shares of the 100 outstanding shares. The directors of the corporation were Lucille H. Jones, John Paul Jones, her husband, and Joseph Gould. The officers of the company originally elected Lucille H. Jones president and treasurer, John Paul Jones vice president, and Joseph Gould secretary. At the time the corporation was organized the offices of the company were at 11 South La Salle street in plaintiff's office. Both John Paul Jones and Joseph Gould officed with plaintiff until November 1, 1935 when plaintiff moved his office to 108 West Madison street. The books, records and seal of the corporation had been kept in his office vault when plaintiff moved to his new office Joseph Gould went elsewhere and took the books, records and seal with him. Gould thereafter turned them over to the receiver.

It is also stated, in the argument based upon the facts, that there were no corporate meetings held after the first organization meeting when directors and officers were elected; that the company had no office anywhere after plaintiff moved from 11 South La Salle street to 105 West Madison street, other than at the residence of the Joneses in Evanston. It is further stated by plaintiff that on February 10, 1941 John Paul Jones and his wife, Lucille H. Jones, appeared in Mr. McCoy's office at 105 West Madison Street; that the Joneses say a meeting of the directors was held there and that plaintiff was elected secretary instead of Joseph Gould; however, there was no real proof made of any such corporate meeting; that the Joneses talked about a meeting but made no proof of it; that it was not shown that it was a regular meeting; in fact that John Paul Jones said he gave notice of the meeting to Joseph Gould by telephone, and so if a meeting were held it must have been a special meeting; Jones was then vice president and Joseph Gould was secretary, so the vice president was giving notice to the secretary. Only Mr. and Mrs. Jones were present as officers, directors or stockholders. Plaintiff further states that he was present but that he was neither a stockholder nor a director. Jones also said there was a meeting of the stockholders and that he sent out a notice by mail probably ten days before the meeting. Plaintiff alleges that no notice calling such a meeting was shown and what if any business was transacted was not shown, nor the authority of the vice president to send out such a notice of ^a stockholders' meeting.

Defendant alleges that in March 1941 the plaintiff sent a statement for legal services rendered to the defendant, addressing it to the corporation, c/o the Joneses at their 630 Sheridan Place,

It is also stated, in the return made upon the writ, that there were no corporate meetings held after the first organization meeting when directors and officers were elected; that the company had no office anywhere after plaintiff moved from 11 South La Salle street to 108 West Madison street, other than at the residence of the Joneses in Evanston. It is further stated by plaintiff that on February 10, 1911 John Paul Jones and Lucille M. Jones, appeared in Mr. McCoy's office at 108 West Madison street; that the Joneses say a meeting of the directors was held there and that plaintiff was elected secretary instead of Joseph Gould; however, there was no real record of any such corporate meeting; that the Joneses talked about a meeting but made no proof of it; that it was not shown that it was a regular meeting; in fact that John Paul Jones said he gave notice of the meeting to Joseph Gould by telephone, and so if a meeting were held it must have been a special meeting; Jones was then vice president and Joseph Gould was secretary, so the vice president was giving notice to the secretary. Only Mr. and Mrs. Jones were present as officers, directors or stockholders. Plaintiff further states that he was present but that he was neither a stockholder nor a director. Jones also said there was a meeting of the stockholders and that he sent out a notice by mail properly ten days before the meeting. Plaintiff alleges that no notice calling upon a meeting was shown and that if any business was transacted was not shown, nor the authority of the vice president to send out such a notice of stockholders' meeting.

Defendant alleges that in March 1911 the plaintiff sent a statement for legal services rendered to the defendant, showing it to the corporation, of the Joneses at their 810 Madison street,

Evanston, Illinois, address. Upon receipt of this bill John Paul Jones went to the office of the plaintiff and stated to the plaintiff that he did not think the corporation owed the plaintiff the money claimed by this statement. On this occasion the plaintiff advised John Paul Jones that, because of certain doctor bills incurred by his wife, the plaintiff was in need of raising money in a hurry, that he had sent this statement in view of this urgency, that the need was past, however, and that he should forget about the statement. The statement for services included items prior to April 8, 1940. On April 8, 1940 plaintiff acknowledged in writing that the defendant was not indebted to him for any services. Defendant paid plaintiff for legal services from time to time as these services were rendered.

The defendant in referring to the scope of the issues before the trial court says that the plaintiff fails to note that the defendant subjected itself to the jurisdiction of the court, to whatever extent was necessary for a determination of the issues, by the original petition filed November 24, 1941. In this petition the defendant did not limit itself to a special appearance and any attempt to do so by subsequent pleadings would be ineffective. The petition of the defendant was filed under section 21 of the Municipal Court of Chicago Act, which provides:

" If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in equity, or by a petition to said Municipal Court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity . . . " Smith-Hurd Statutes, 1941, chapter 37, section 376; People v. Ehler (1933) 353 Ill. 595; Satin and Company v. Twin City Fire Ins. Co., (1925) 238 Ill. App. 440.

Defendant argues that since the petitioner in such a proceeding is asking the court to do equity, it is not unreasonable to require that the petition contain allegations showing a meritorious defense to the suit in order that the vacating of judgment be shown to have a purpose.

Evans, Illinois, address. Upon receipt of this bill from Paul Jones went to the office of the plaintiff and asked to see plaintiff that he did not think the corporation owed the plaintiff the money claimed by this statement. In this regard in the opinion of the plaintiff advised John Jones that, because of certain losses incurred by his wife, the plaintiff was in need of raising money in a hurry, that he had sent this statement in view of this urgency, that the need was past, however, and that he should forget about the statement. The statement for services rendered prior to April 8, 1940. On April 8, 1940 plaintiff acknowledged in writing that the defendant was not indebted to him for any services. Defendant paid plaintiff for legal services from time to time as these services were rendered. The defendant in referring to the scope of the issue before the trial court says that the plaintiff fails to note that the defendant subjected itself to the jurisdiction of the court, to whatever extent was necessary for a determination of the issues, by the original petition filed November 24, 1941. In this petition the defendant did not limit itself to a specific response and any attempt to do so by subsequent pleading would be ineffective. The petition of the defendant was filed under section 21 of the Illinois Court of Civil Act, which provides:

" . . . If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon a showing of error, or by a bill in equity, or by a petition to set aside or modify any judgment, order or decree, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity . . . (Ill. Civ. Stat., 1941, Chapter 27, Section 278; People v. People (1935) 353 Ill. 595; Wain and Company v. The City of Chicago (1935) 358 Ill. App. 440.)

Defendant argues that since the petitioner in such a proceeding is asking the court to do equity, it is not responsible to require that the petition contain allegations showing a meritorious defense to the suit in order that the vacation of judgment be shown to have a purpose.

It was the plaintiff's duty to prepare the minutes and attend to other formal requirements legally effectuating this change in the secretaryship and directorship of the corporation from Joseph Gould to himself. If he neglected to perform this duty it would not be equitable to permit him to take advantage of this neglect for the purpose of obtaining a default judgment against the defendant by serving Joseph Gould as agent of the defendant corporation.

The evidence showing the defense of payment to the plaintiff's claim was material upon the issues of plaintiff's good faith or fraud, and it is urged that the court properly held under section 21 of the Municipal Court Act that bad faith exhibited by plaintiff amounted to fraud. In the present case the evidence before the court tended to show, and the plaintiff's own admission by his instructions to the Lake Shore Trust and Savings Bank verified the fact, that Joseph Gould was not the secretary or director of the defendant corporation. Plaintiff was a registered agent of the corporation and had been acting as its attorney and had never resigned as such attorney or been discharged as such attorney up to the time he commenced his suit. Joseph Gould whom the plaintiff asked the bailiff to serve with the summons, was under no duty to defend the suit, since his official capacity as secretary and director had ceased, and his failure to act in the matter indicates that he did not regard himself as an officer of the corporation. It is suggested by the defendant that from the evidence before it the trial court was amply justified in finding that the plaintiff was actually the secretary of the defendant corporation as well as director, performing the duties as such, and under a duty to carry out a trust to the corporation, because of his fiduciary relationship to it. If plaintiff was secretary and director of the defendant corporation it would follow as a matter of course that Joseph Gould was not.

It was the plaintiff's duty to prepare the minutes and

attend to other formal requirements lawfully effectuating this change in the secretarial and directorship of the corporation from Joseph Gould to himself. It is neglected to perform this duty it would not be equitable to permit him to take advantage of this neglect for the purpose of obtaining a self-made judgment against the defendant by saying Joseph Gould was agent of the defendant corporation.

The evidence showing the failure of payment to the plaintiff's claim was material upon the issue of plaintiff's good faith or fraud, and it is urged that the court properly held under section 21 of the Municipal Court Act that plaintiff exhibited by plaintiff amounted to fraud. In the present case the evidence before the court tended to show, and the plaintiff's own admission by his instructions to the Lake Shore Trust and Savings Bank verified the fact, that Joseph Gould was not the secretary or director of the defendant corporation. Plaintiff was a registered agent of the corporation and had been acting as its attorney and had never resigned as such attorney or been discharged as such attorney up to the time he commenced his suit. Joseph Gould whom the plaintiff asked the plaintiff to serve with the summons, was under no duty to defend the suit, since his official capacity as secretary and director had ceased, and his failure to act in the matter indicated that he did not represent himself as an officer of the corporation. It is suggested by the defendant that from the evidence before it the trial court was fully justified in finding that the plaintiff was actually the secretary of the defendant corporation as well as director, performing the duties as such, and under a duty to carry out a trust to the corporation, because of his fiduciary relationship to it. It is plaintiff's secretary and director of the defendant corporation it would follow as a matter of course that Joseph Gould was not.

From the facts it appears that the purchaser of the patent application in the Superior Court proceeding was Max Schreiber, who bought for \$100 an asset for which he previously had been negotiating at a price of \$4000. The rights of the purchaser from the receiver in the Superior Court action have no part in determining whether the Municipal Court of Chicago had jurisdiction to vacate its judgment under section 21 of the Municipal Court of Chicago Act.

One of the questions that is to be considered is whether the court had jurisdiction to determine the issues presented by the defendant. It appears that Lucille H. Jones, on behalf of the corporation, filed a petition in the Municipal Court in this case on the 24th day of November, 1941, in which the court was asked to set aside the judgment against the Hy-G Corporation. This petition was amended by the petition filed under date of December 9, 1941, to which plaintiff filed an answer joining the issues. A hearing thereon was had commencing on December 22, 1941. Evidence was introduced on behalf of both plaintiff and defendant and the trial court vacated the judgment and quashed the summons and execution on the 23rd day of December.

Plaintiff argues that the defendant's petition constitutes a special appearance on behalf of the defendant, for the purpose of attacking the jurisdiction of the court to enter the judgment against it. It, however, appears that the defendant subjected itself to the jurisdiction of the court, to whatever extent was necessary for a determination of the issues, by the original petition filed November 24, 1941. In this petition the defendant did not limit itself to a special appearance and any attempt to do so by subsequent pleadings would be ineffective. In the case of Ragwald Brandt v. St. Paul Mercury Indemnity Co., 285 Ill. App. 212, the court held that a pleading attacking jurisdiction of the court and limiting the appearance to a special appearance is

From the facts it appears that the purpose of the patent application in the Superior Court proceeding was to obtain who bought for 100 an asset for which he previously had been negotiating at a price of 4000. The rights of the warehouse from the receiver in the Superior Court action have no part in determining whether the Municipal Court of Chicago has jurisdiction to vacate its judgment under section 21 of the Municipal Court of Chicago Act.

One of the questions that is to be considered is whether the court had jurisdiction to determine the issues presented by the defendant. It appears that Justice W. Jones, on behalf of the corporation, filed a petition in the Municipal Court in this case on the 24th day of November, 1941, in which the court was asked to set aside the judgment against the Hy-F Corporation. This petition was amended by the petition filed under date of November 9, 1941, to which plaintiff filed an answer joining the issues. A hearing thereon was had commencing on December 22, 1941. Evidence was introduced on behalf of both plaintiff and defendant and the trial court vacated the judgment and entered the reasons and execution on the 23rd day of December.

Plaintiff argues that the defendant's petition constitutes a special appearance on behalf of the defendant, for the purpose of attacking the jurisdiction of the court to enter the judgment against it. It, however, contends that the defendant subjected itself to the jurisdiction of the court, to whatever extent was necessary for a determination of the issues, by its original petition filed November 24, 1941. In this petition the defendant did not limit itself to a special appearance and any attempt to do so by subsequent pleading would be ineffective. In the case of Raymond Landt v. St. Paul Mercury Indemnity Co., 328 Ill. App. 212, the court held that a pleading attacking jurisdiction of the court and limiting the appearance to a special appearance is

waived where concurrently a pleading raising an issue to the merits is also filed.

We think the court acted properly for the reason that under the facts as they appear here the defendant submitted itself to the jurisdiction of the court for the purpose of determining the issues as they were presented, and the court entered a proper order when it agreed with the defendant that the judgment be quashed.

We are of the opinion under the facts and the law as applied in this case that the court was justified in entering the order vacating the judgment and quashing the execution, and that the cause be reversed and remanded to the trial court for the purpose of hearing the matter on its merits.

JUDGMENT VACATED AND CAUSE REMANDED
WITH DIRECTIONS.

BURKE, P.J. AND KILEY, J. CONCUR.

waived where concurrently a pleading raising an issue to the merits is also filed.

We think the court acted properly for the reason that under the facts as they appear here the defendant submitted itself to the jurisdiction of the court for the purpose of determining the issues as they were presented, and the court entered a proper order when it agreed with the defendant that the judgment be quashed. We are of the opinion under the facts and the law as applied in this case that the court was justified in entering the order vacating the judgment and quashing the execution, and that the cause be reversed and remanded to the trial court for the purpose of hearing the matter on its merits.

JUDGMENT VACATED AND CASE REMANDED
WITH DIRECTIONS.

BURKE, P. J. AND KILLEY, J. CONCUR.

42273

CHARLOTTA RANKIN,

Appellee,

v.

EUGENE L. RACE, surviving partner
of A. P. Rankin & Co.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

318 I.A. 230

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

It appears from the statement of the case that on November 15, 1941, Charlotta Rankin, the plaintiff in this action, filed suit in the Municipal Court of Chicago against the defendant Eugene L. Race as surviving partner of A. P. Rankin & Co., upon an unendorsed promissory note dated March 1, 1931, in the principal sum of \$2,000, signed "A. P. Rankin & Co. by E. L. Race", payable to the order of James Rankin, husband of the plaintiff. The cause was heard by the court without a jury and judgment was rendered against the defendant for \$3,260, including interest. The defendant has perfected his appeal to this court from the judgment that was rendered by the trial court.

Plaintiff's theory was that she was the owner of the note; that she acquired ownership of the note unendorsed on March 2, 1931, by gift and delivery of the note from her husband, James Rankin, the payee in said note.

The theory of the defendant, on the other hand, is that James Rankin did not give the note to the plaintiff but that he had it in his safety deposit box and was the owner thereof at the time of his death, and that if the plaintiff came into possession of the note as she claimed, it was not given to her as a gift, but only for safekeeping by her, and that she was therefore not the owner of the note. That the defendant did not receive any consideration for the making of the note. That the indebtedness evidenced by the note was due from Arthur P. Rankin, to whom the sum of \$2,000 was loaned by James Rankin. That the plaintiff was not the

CHARLOTTE HANKIN,

Appellee,

v.

EUGENE L. RACE, surviving partner
of A. F. Rankin & Co.,

Appellant.

MR. JUSTICE HALL delivered the opinion of the court.

It appears from the statement of the case that on

November 15, 1941, Charlotte Rankin, the plaintiff in this action, filed suit in the Municipal Court of Chicago against the defendant

Eugene L. Race as surviving partner of A. F. Rankin & Co., upon

an unendorsed promissory note dated March 1, 1937, in the principal sum of \$2,000, signed "A. F. Rankin & Co. by E. L. Race", payable

to the order of James Rankin, husband of the plaintiff. The

case was heard by the court without a jury and judgment was

rendered against the defendant for \$2,750, including interest. The

defendant has perfected his appeal to this court from the judgment

that was rendered by the trial court.

Plaintiff's theory was that she was the owner of the note;

that she acquired ownership of the note unendorsed on March 2, 1937,

by gift and delivery of the note from her husband, James Rankin,

the payee in said note.

The theory of the defendant, on the other hand, is that

James Rankin did not give the note to the plaintiff but that he had

it in his safety deposit box and gave the same to her at the time

of his death, and that if the plaintiff came into possession of

the note as she claimed, it was not given to her as a gift, but

only for safekeeping by her, and that she was therefore not the

owner of the note. That the defendant did not receive any consideration

for the making of the note, that the indebtedness evidenced

by the note was due from James Rankin, to whom the sum of

\$2,000 was loaned by James Rankin, that the plaintiff was not the

holder of the note for value,

The errors relied on for reversal are that the judgment was contrary to the evidence; that the court erred in rendering judgment for the plaintiff and in failing to enter judgment for the defendant.

The facts as they appear from this record are that the plaintiff, Charlotta Rankin, also referred to in this case as Charlotte Rankin, filed a statement of claim demanding judgment against the defendant upon a note dated March 1, 1931, for \$2,000, signed "A. P. Rankin & Co. by E. L. Race", payable to the order of James Rankin, husband of the plaintiff, due in one year. The defendant filed an answer to plaintiff's statement of claim. By leave of court, the defendant filed an amended answer in which he denied that he received any valuable consideration or benefit at the time of the making, execution and delivery of the note to James Rankin, or at any time, and the defendant alleged that said note was merely accommodation paper given to secure a debt due and owing by Arthur P. Rankin to James Rankin, no part of which indebtedness was due or owing by the defendant or by A. P. Rankin & Co. The defendant denied that the plaintiff was the actual and bona fide owner of the note and denied that she acquired title thereto by gift from James Rankin. The defendant alleged that the note was unendorsed and that upon the death of James Rankin, the payee, the note became a part of the assets of the estate of James Rankin. The defendant further alleged that he had no knowledge as to whether or not the note remained unpaid and alleged that the plaintiff had filed a claim in the Probate Court of Cook County against the estate of James Rankin, deceased, and that on November 3, 1933, that claim was allowed by the Probate Court for \$2,321.20, including interest. The defendant further alleged that James Rankin left a

holder of the note for value.

The errors relied on for reversal are that the judgment was contrary to the evidence; that the court erred in rendering judgment for the plaintiff and in failing to enter judgment for the defendant.

The facts as they appear from this record are that the plaintiff, Charlotte Rankin, also referred to in this case as Charlotte Rankin, filed a statement of claim demanding judgment against the defendant upon a note dated March 1, 1931, for \$5,000, signed "A. P. Rankin & Co. by A. L. Pace", payable to the order of James Rankin, husband of the plaintiff, due in one year. The defendant filed an answer to plaintiff's statement of claim. By leave of court, the defendant filed an amended answer in which he denied that he received any valuable consideration or benefit at the time of the making, execution and delivery of the note to James Rankin, or at any time, and the defendant alleged that this note was merely accommodation paper given to secure a debt due and owing by Arthur P. Rankin to James Rankin, no part of which indebtedness was due or owing by the defendant or by A. P. Rankin & Co. The defendant denied that the plaintiff was the actual and bona fide owner of the note and denied that she acquired title thereto by gift from James Rankin. The defendant alleged that the note was unendorsed and that upon the death of James Rankin, the same, the note became a part of the assets of the estate of James Rankin. The defendant further alleged that he had no knowledge as to whether or not the note remained unendorsed and alleged that the plaintiff had filed a claim in the Probate Court of Good County against the estate of James Rankin, deceased, and that on November 3, 1932, that claim was allowed by the Probate Court for \$5,000.00, including interest. The defendant further alleged that James Rankin had

last will and testament, whereby he bequeathed one-third of his property to his wife, the plaintiff, and the remainder equally to his son and daughter, but that the will was never delivered to or filed in the Probate Court. The defendant further alleged that the plaintiff was not a bona fide holder or a holder in due course of said note, and that she had no title to the note or right to sue thereon, and that she was not the owner of the note for value.

The plaintiff filed a reply denying all of the claims set out in the defendant's answer. The reply of the plaintiff stood as her reply to the amended answer.

The following facts were disclosed:

The defendant, Eugene L. Race, and Arthur P. Rankin were partners in the real estate firm of A. P. Rankin & Co., on Madison Street, in Chicago. Arthur P. Rankin's brother, James Rankin, was engaged in the plumbing business in the next block. Race had known James Rankin for over forty years, and he was a friend of James Rankin and his wife.

The 1st of March, 1929, Arthur P. Rankin was in financial difficulty and wanted to borrow some money from his brother James, and he asked Race to go to James to get the money. Race went to James Rankin's office and told him that Arthur Rankin wanted to borrow \$2,000. James Rankin came to the office of Rankin & Co. and gave his personal check for \$2,000 to Arthur Rankin. A note was made up due in one year. The defendant, Eugene L. Race signed the note "A. P. Rankin & Co. by E. L. Race". Race never received any part of the proceeds of the \$2,000 note. When the note became due March 1, 1930, Arthur P. Rankin paid the interest and gave a new note for \$2,000. When the latter note became due a year later, Arthur Rankin not A. P. Rankin & Co paid the interest on the note, and a new note dated March 1, 1931, due one year thereafter was made up and Eugene L. Race signed the note "A. P. Rankin & Co. by E. L. Race" payable to the order of James Rankin. That James Rankin did not know enough to draw up a note; that he had confidence in Arthur Rankin and in

last will and testament, whereby he bequeathed one-third of his property to his wife, the plaintiff, and the remainder equally to his son and daughter, but that the will was never delivered to or filed in the Probate Court. The defendant further alleged that the plaintiff was not a bona fide holder or a holder in due course of said note, and that she had no title to the note or right to sue thereon, and that she was not the owner of the note for value. The plaintiff filed a reply denying all of the claims set out in the defendant's answer. The reply of the plaintiff stood as her reply to the amended answer.

The following facts were disclosed:

The defendant, Eugene L. Race, and Arthur P. Rankin were partners in the real estate firm of A. P. Rankin & Co., on Madison Street, in Chicago. Arthur L. Rankin's brother, James Rankin, was engaged in the plumbing business in the next block. Race had known James Rankin for over forty years, and he was a friend of James Rankin and his wife.

The last of March, 1930, Arthur P. Rankin was in financial difficulty and wanted to borrow some money from his brother James, and he asked Race to go to James to get the money. Race went to James Rankin's office and told him that Arthur Rankin wanted to borrow \$2,000. James Rankin came to the office of Rankin & Co. and gave his personal check for \$2,000 to Arthur Rankin. A note was made up due in one year. The defendant, Eugene L. Race, signed the note "A. P. Rankin & Co. by E. L. Race". Race never received any part of the proceeds of the \$2,000 note. When the note became due March 1, 1930, Arthur P. Rankin paid the interest and gave a new note for \$2,000. When the latter note became due a year later, Arthur Rankin did not A. P. Rankin & Co. paid the interest on the note, and a new note dated March 1, 1931, due one year thereafter was made up and Eugene L. Race signed the note "A. P. Rankin & Co. by E. L. Race" payable to the order of James Rankin. That James Rankin did not know enough to draw up a note; that he had confidence in Arthur Rankin and in

Race and that Race prepared the note. That all interest paid on the note was paid by Arthur Rankin.

James Rankin died suddenly on May 13, 1931, leaving him surviving his widow, the plaintiff, his daughter and a son. The son died in 1934, leaving surviving him a wife and a child, both of whom are still living.

Arthur Rankin died on June 30, 1932. The plaintiff, Charlotta Rankin filed a claim against the estate of Arthur P. Rankin on the note being sued upon herein, which claim was allowed for \$2,321.20 in the Probate Court. That after the death of James Rankin, Arthur Rankin told Mrs. James Rankin that the obligation was personally his.

On November 15, 1941, the plaintiff filed this suit against Eugene L. Race as surviving partner of A. P. Rankin & Co. to recover from him the principal amount of the note and interest thereon from March 1, 1931.

The plaintiff testified that she first saw the note on March 2, 1931, when James Rankin gave her the note; that he gave it to her because she always objected to his carrying his valuable papers around with him when he was out nights. That the night she first saw the note, James Rankin had it in his pocket and that she supposed he was going to Lodge; that he took it out of his pocket and handed it to her; that he gave it to her. He said, "Take care of it". That he was going out and she took care of it. That she did not put the note in a safety deposit box, but she had it at home. That was all the conversation that took place at the time he told her to take care of the note.

Plaintiff testified that on the evening of James Rankin's death there was a conversation at her home that someone would go to the safety deposit box of James Rankin at the Reliance Bank to which she and her daughter had access. The very next morning, early in the morning, plaintiff's daughter went to the safety deposit box

case and that note preserved the note. That all interest was on the note was said by Arthur Rankin.

James Rankin died suddenly on May 27, 1931, leaving him surviving his widow, the plaintiff, his daughter and a son. The son died in 1934, leaving surviving him a wife and a child, both of whom are still living.

Arthur Rankin died on June 30, 1932. The plaintiff,

Charlotte Rankin filed a claim against the estate of Arthur Rankin on the note being sued upon herein, which claim was allowed for \$2,321.80 in the Probate Court. That after the death of James Rankin, Arthur Rankin told Mrs. James Rankin that the obligation was personally his.

On November 1, 1941, the plaintiff filed this suit against Eugene L. Pace as surviving partner of A. J. Rankin & Co. to recover from him the principal amount of the note and interest thereon from March 1, 1931.

The plaintiff testified that she first saw the note on March 2, 1931, when James Rankin gave her the note; that he gave it to her because she always objected to his carrying his valuable papers around with him when he was out of the house. That she first saw the note, James Rankin had it in his pocket and that she supposed he was going to leave; that he took it out of his pocket and handed it to her; that he gave it to her. He said, "Take care of it", that he was going out and she took care of it. That she did not put the note in a safety deposit box, but she had it at home. That was all the conversation that took place at the time he told her to take care of the note.

Plaintiff testified that on the evening of James Rankin's death there was a conversation at her home that someone would go to the safety deposit box of James Rankin at the Belmont Hotel to which she and her daughter had access. The very next morning, early in the morning, plaintiff's daughter went to the safety deposit box

and removed all papers from the box. That plaintiff did not know whether the Attorney General's office or the State Treasurer's office were notified.

Mr. Kolb, attorney for plaintiff, asked the court for judgment for \$3,260 which the court entered.

It is contended by the plaintiff in this action that no consideration as to defendant Race was necessary on his theory of the case, for he was an accommodation maker of the note in question. Plaintiff having acquired the note through a holder in due course has all the rights of the payee of the note whether she is a holder in due course or not, and calls attention to Paragraph 44 of the Negotiable Instruments Law, which provides:

"Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value."

Plaintiff contends further that thus the burden of proof to overcome this presumption was cast upon defendant Race, citing American National Bank v. Woolard, 342 Ill. 148, and Wolf v. Peoples Bank, 255 Ill. App. 127.

To overcome this presumption and maintain this burden of proof, defendant Race endeavored to prove what he had alleged in his answer to the complaint, which is as follows:

"Said note was merely accommodation paper given to secure a debt due and owing by said Arthur P. Rankin to said James Rankin, no part of which indebtedness was due or owing by this defendant or by A. P. Rankin & Co."

And it further appears from the testimony of defendant Race that on March 1, 1929, at the request of Arthur Rankin, he, Race, told James Rankin that Arthur wanted to borrow \$2,000; that James Rankin brought the \$2,000 to the office of A. P. Rankin & Co., gave it to Arthur Rankin and he, Race, then made a \$2,000 note like the one sued on, bearing that date; that Arthur Rankin asked him to sign it; it was signed just like this one, "A. P. Rankin & Co. by E. L. Race."

and removed all papers from the box. Plaintiff did not know whether the Attorney General's office of the State Treasurer's office were notified.

Mr. Wolf, attorney for plaintiff, asked the court for

judgment for \$3,500 which the court entered.

It is contended by the plaintiff in this action that no

consideration as to defendant was necessary on his theory of the case, for he was an accommodation maker of the note in question. Plaintiff having acquired the note through a holder in due course has all the rights of the payee of the note whether she is a holder in due course or not, and calls attention to paragraph 4 of the Negotiable Instruments Law, which provides:

"Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value."

Plaintiff contends further that since the burden of proof to overcome

this presumption was cast upon defendant here, citing Reynolds

National Bank v. Wolf, 242 Ill. 118, and Wolf v. National Bank,

255 Ill. App. 107.

To overcome this presumption and maintain this burden of

proof, defendant here endeavored to prove what he has alleged in

his answer to the complaint, which is as follows:

"said note was merely accommodation paper, given to secure a debt due and owing by said Arthur J. Rankin to said James Rankin, no part of which indebtedness was due or owing by said defendant to or by A. J. Rankin & Co."

and it further appears from the testimony of defendant that

on March 1, 1929, at the request of Arthur Rankin, he, Rankin, told

James Rankin that Arthur Rankin wanted to borrow \$2,000; that James Rankin

brought the \$2,000 to the office of A. J. Rankin & Co., gave it to

Arthur Rankin and he, Rankin, then made a \$2,000 note like the one

used on, bearing that date; that Arthur Rankin asked him to sign it;

it was signed just like this one, "A. J. Rankin & Co., by A. J. Rankin."

It was for one year and was then renewed by a second one made by him and likewise signed. On its maturity, he drew the one sued on and gave it to James Rankin.

Thus it appears from the evidence according to this witness, if his story is to be believed on this, and there is no evidence contradicting it (Arthur and James Rankin have long since died), this note is a second renewal of a note given in 1929. The 1929 note was for \$2,000, loaned by an old friend to his brother, a member of this firm and at that brother's request Race signed the partnership name by him himself to that note. He therefore signed the instrument as maker for the purpose of lending his name to some other person.

Attention is called to Paragraph 49 of the Negotiable Instruments Act, which provides:

"An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party and in case a transfer after maturity was intended by the accommodating party notwithstanding such holder acquired title after maturity."

It appears from the briefs filed that James Rankin was not the accommodated party. The accommodated party was Arthur Rankin, who desired the loan and arranged it through Race. James Rankin could not be the accommodated party for he advanced the money on the note. In this connection plaintiff cites the case of Central Republic Trust Co. v. Evans, 378 Ill. 58. It appearing that James Rankin was thus the holder for value of this note on which Race accommodated his partner, Arthur Rankin, with the use of his, Race's, name, Race was liable even if James Rankin knew him to be only an accommodation party, even if Race received no part of the \$2,000.

Paragraph 78 of the Negotiable Instruments Act provides:

"In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as

It was for one year and was then renewed by a second one made by him and likewise signed. On its maturity, he drew the one used on and gave it to James Rankin.

Thus it appears from the evidence according to this witness, if his story is to be believed on this, and there is no evidence contradicting it (Arthur and James Rankin have long since died), this note is a second renewal of a note given in 1929. The 1929 note was for \$2,000, loaned by an old friend to his brother, a member of this firm and at that brother's request was signed the partnership name by him himself to that note. He therefore signed the instrument as maker for the purpose of lending his name to some other person.

Attention is called to Paragraph 49 of the Negotiable

Instrument Act, which provides:

"An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, for the purpose of lending his name to some other person, such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party and in case a transfer after maturity was intended by the accommodating party notwithstanding such holder acquired title after maturity."

It appears from the briefs filed that James Rankin was not the accommodated party. The accommodated party was Arthur Rankin, who desired the loan and arranged it through Race. James Rankin could not be the accommodated party for he advanced the money on the note. In this connection plaintiff cites the case of Central Bank of Georgia v. Evans, 378 Ill. 52. It appearing that James Rankin was then the holder for value of this note on which was accommodated his partner, Arthur Rankin, with the use of his name, Race was liable even if James Rankin knew him to be only an accommodation party, even if Race received no part of the \$2,000.

Paragraph 78 of the Negotiable Instrument Act provides:

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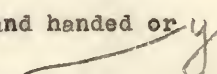
if it were non-negotiable. But the holder who derives his title through a holder in due course, and who is not himself a party to any fraud or duress or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to such holder."

Plaintiff secured this note from the payee, James Rankin, by gift. She therefore falls within this provision of the statute. James Rankin was surely a holder in due course of the note against whom this defense alleged would not lie and she has all the rights of James in respect to the makers of the note. The further argument is called to our attention by the plaintiff in this connection that this defense is not convincing for the reason that Race and Arthur Rankin were experienced businessmen, in the real estate business in Chicago for many years and no doubt had before this borrowed money from James Rankin, and that this is said because of the evident ease with which this loan was obtained. Furthermore, that James Rankin knew little of drawing these and similar papers and Race seemed to have acted as scrivener in James Rankin's transactions, so he knew what he was doing. There is no direct contradictory evidence to Race's that Arthur got this money, because James and Arthur are dead and no one can directly deny it, but the interest was paid by the company check, though Race first said Arthur paid it and later said the company charged the check to Arthur's account. But Race is directly contradicted by plaintiff and her daughter when he says that shortly after James's death, Arthur and he called on Mrs. Rankin and her daughter and Arthur then said this was his debt and he would pay it. Plaintiff and her daughter deny this talk was had. If he didn't tell the truth about that talk, perhaps he was not telling it about borrowing this money. It seems to be far more reasonable to believe this was one of the other transactions wherein the firm got money from James Rankin and gave him the company note for it. It seems hardly reasonable that Race would sign the note and assume liability thereon otherwise. But, as above pointed out,

if it were non-negotiable. But the holder who receives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to such holder."

Plaintiff secured this note from the payee, James Rankin, by gift. She therefore falls within the provision of the statute. James Rankin was surely a holder in due course of the note against whom this defense alleged would not lie and she has all the rights of James in respect to the makers of the note. The further argument is called to our attention by the plaintiff in this connection that this defense is not convincing for the reason that James and Arthur Rankin were experienced businessmen, in the real estate business in Chicago for many years and no doubt had before this borrowed money from James Rankin, and that this is said because of the evident ease with which this loan was obtained. Furthermore, that James Rankin knew little of drawing these and similar notes and was seemed to have acted as scrivener in James Rankin's transactions, so he knew what he was doing. There is no direct contradictory evidence to show that Arthur got this money, because James and Arthur are dead and no one can directly deny it, but the interest was paid by the company check, though Race first said Arthur paid it and later said the company charged the check to Arthur's account. But Race is directly contradicted by plaintiff and her daughter when he says that shortly after James's death, Arthur and he called on Mrs. Rankin and her daughter and Arthur then said this was his debt and he would pay it. Plaintiff and her daughter deny this is so and if he didn't tell the truth about that, why would he be so far from telling it about borrowing this money. It seems to be far more reasonable to believe this was one of the other transactions wherein the firm got money from James Rankin and gave him the company note for it. It seems hardly reasonable that she would sign the note and assume liability thereon otherwise. But, as above pointed out,

under the facts in this case it is wholly immaterial whether he did or not. He is still liable on the note as an accommodation maker to plaintiff who took the note from a holder in due course.

The defendant contends that the plaintiff was not the owner of the note and had no title thereto and no right to sue thereon and that according to plaintiff's own testimony James Rankin had a safety deposit box at the Reliance Bank in which he kept all his valuable papers and to which plaintiff had access. It does not appear to be reasonable to believe that James Rankin did not also keep the note in question in his safety deposit box. It certainly seems suspicious that early on the morning following the death of James Rankin plaintiff's daughter with the knowledge of the plaintiff went to the vault and removed all of James Rankin's papers. She concealed from the officials of the bank the fact that her father was dead and she removed the contents of the box without notifying the public officials who would be present at the opening of the box and would list the property for inheritance tax purposes. The papers were removed, not only to avoid possible inheritance taxes, but to prevent the State Treasurer's office from listing all of the securities which were in the box. It is reasonable to believe that if such a list were made it would disclose that the note sued upon herein was with James Rankin's other papers in his safety deposit box when he died. The testimony of the plaintiff that she kept the note at home seems incredible, according to the suggestion offered by the defendant, in view of the fact that she had other personal things in the safety deposit box. It is urged that if plaintiff's testimony as to how she came into possession of the note is to be given credence her testimony does not prove that she received the note as a gift. Her testimony is that her husband handed or  gave the note to her because she objected to his carrying his

under the facts in this case it is wholly immaterial whether he did or not. He is still liable on the note as an accommodation maker to plaintiff who took the note from a holder in due course. The defendant contends that the plaintiff was not the owner of the note and had no title thereto and no right to sue thereon and that according to plaintiff's own testimony James Rankin had a safety deposit box at the Reliance Bank in which he kept all his valuable papers and to which plaintiff had access. It does not appear to be reasonable to believe that James Rankin did not also keep the note in question in his safety deposit box. It certainly seems suspicious that early on the morning following the death of James Rankin plaintiff's daughter with the knowledge of the plaintiff went to the vault and removed all of James Rankin's papers. She concealed from the officials of the bank the fact that her father had died and she removed the contents of the box without notifying the public officials who would be present at the opening of the box and would list the property for inheritance tax purposes. The papers were removed, not only to avoid possible inheritance taxes, but to prevent the State Treasurer's office from listing all of the securities which were in the box. It is reasonable to believe that if such a list were made it would disclose that the note sued upon herein was with James Rankin's other papers in his safety deposit box when he died. The testimony of the plaintiff that she kept the note at home seems incredible, according to the suggestion offered by the defendant, in view of the fact that she had other personal things in the safety deposit box. It is urged that if plaintiff's testimony as to how she came into possession of the note is to be given credence her testimony does not prove that she received the note as a gift. Her testimony is that her husband handed or gave the note to her because she objected to his earning his

valuable papers around with him when he was out nights; that she supposed he was going to lodge and he took it out of his pocket and handed it to her and that he said "Take care of it", and that she took care of it. She testified further, "He was going out and I took care of it." The plaintiff further testified that that was all the conversation that took place regarding the note at the time he told her to take care of it.

It further appears from the suggestion that is offered that the note to which the plaintiff claims title is unendorsed. Section 49 of the Negotiable Instruments Law (Ill. Rev. Stats., 1941, Ch. 98, Par. 69) provides that a holder may transfer an instrument payable to his order for value without endorsing it. In the case of Rothwell v. Taylor, 303 Ill. 226, it was held that a negotiable instrument is subject to a valid gift, and that endorsement is not essential to pass title, but that endorsement is important in establishing a gift. There are cases cited in support of this contention, and the case of Bolton v. Bolton, 306 Ill. 473, which is called to our attention wherein the court said:

"The law never presumes a gift, and the burden of proof thereof is upon the donee to prove the essential facts of a gift, which essentials are the delivery of the property by the donor to the donee with intent to pass the title. Such proof to sustain the gift must by the weight of authority be clear and convincing."

To the same effect is the case of Rothwell v. Taylor, 303 Ill. 226, and defendant cites the following cases as of the same effect: Collins v. Ogden, 323 Ill. 594; Elvin v. Wuchetich, 326 Ill. 285; People v. Polhemus, 367 Ill. 185; and City N. B. & T. Co. v. Oberheide Coal Co., 307 Ill. App. 519. There are further cases called to the attention of the court for the purpose of showing that the evidence did not show that a gift was made to the plaintiff.

However, when we come to consider the suggestion that is offered by the plaintiff, it appears from the complaint that was filed that she is now the actual bona fide owner of said note and

valuable papers around with him when he was out nights; that she supposed he was going to lodge and he took it out of his pocket and handed it to her and that he said "Take care of it", and that she took care of it. The testifies further, "He was going out and I took care of it." The plaintiff further testified that that was all the conversation that took place regarding the note at the time he told her to take care of it.

It further appears from the suggestion that is offered that the note to which the plaintiff claims title is unendorsed. Section 49 of the Negotiable Instruments Law (Ill. Rev. Stat., 1941, Ch. 98, Par. 69) provides that a holder may transfer an instrument payable to his order for value without endorsing it. In the case of Bothwell v. Taylor, 303 Ill. 286, it was held that negotiable instrument is subject to a valid gift, and that endorsement is not essential to pass title, but that endorsement is important in establishing a gift. Where are cases cited in support of this contention, and the case of Holton v. Holton, 308 Ill. 473, is called to our attention wherein the court said:

"The law never presumes a gift, and the burden of proof thereof is upon the donee to prove the essential facts of a gift, which essentials are the delivery of the property by the donor to the donee with intent to pass the title, such proof to sustain the gift must by the weight of authority be clear and convincing."

To the same effect is the case of Bothwell v. Taylor, 303 Ill. 286, and defendant cites the following cases as of the same effect: Gollins v. Ogden, 323 Ill. 594; Wain v. Wain, 323 Ill. 235; People v. Polhemus, 327 Ill. 132; and Giv v. G. & T. Co. v. Oberheide Coal Co., 307 Ill. 409. There are further cases called to the attention of the court for the purpose of showing that the evidence did not show that a gift was made to the plaintiff. However, when we come to consider the suggestion that is offered by the plaintiff, it appears from the complaint that was filed that she is now the actual bona fide owner of said note and

acquired title thereto March 2, 1931 by gift from and delivery by James Rankin. The evidence uncontradicted to prove this is set out above. It is also uncontradicted that she has since had the note in her exclusive possession. Paragraph 69 of the Negotiable Instruments Law provides:

"Where the holder of an instrument payable to his own order transfers it for value without endorsing it, the transferer vests in the transferee such title as the transferer had therein ***."

And plaintiff further cites authorities that a negotiable instrument is subject to a valid gift and endorsement is not necessary to pass title, citing Rothwell v. Taylor, 303 Ill. 226; City Nat'l. Bk. & T. Co. v. Oberheide Coal Co., 307 Ill. App. 519; and In re Wright's Estate, 304 Ill. App. 87.

The plaintiff calls attention to the fact that counsel for the defendant cites many cases on pages 11 to 15 of his brief as to what constitutes a gift; that it must be shown by clear and convincing evidence; and that the donee is not competent to testify as to the gift; that there must be other competent evidence to establish it than that of the donee; but that the court will note that in all the cases cited by counsel for defendant that question arose in a contest between the executor or administrator of a deceased person's estate and the donee of the deceased person or between the donor and donee. Manifestly under the Evidence Act the donee cannot testify as to transactions or conversations of the deceased person in an action where the executor or administrator is the opposite party. But such is not the case here. The estate of James Rankin is in no way involved here. This is a suit by this donee against Race, the maker of this note.

Even if there had been no gift of this note to the plaintiff by the payee, she can, nevertheless, maintain this suit.

While the plaintiff does not concede that there was no gift of this note to her but contends that the evidence is uncontradicted and conclusive, counsel has urged the contrary in his brief and by misquoting the evidence and stating unfounded

acquired title thereto March 2, 1931 by gift from and delivery by James Rankin. The evidence uncontradicted to prove this is set out above. It is also uncontradicted that she has since had the note in her exclusive possession. Paragraph 63 of the Negotiable Instruments Law provides:

"Where the holder of an instrument payable to his own order transfers it for value without endorsing it, the transfer vests in the transferee such title as the transferor had therein."

And plaintiff further cites authorities that a negotiable instrument is subject to a valid gift and enforcement is not necessary to pass title, citing Robb v. Taylor, 303 Ill. 228; Wiley v. Wiley, 307 Ill. 519; and In re Estate of T. Co. v. Oberholzer Coal Co., 307 Ill. 519; and in Rankin's Estate, 304 Ill. App. 27.

The plaintiff calls attention to the fact that counsel for the defendant cites many cases on cases in which the gift is to what constitutes a gift; that it must be shown by clear and convincing evidence; and that the donee is not competent to testify as to the gift; that there must be other competent evidence to establish it than that of the donee; but that the court will note that in all the cases cited by counsel for defendant that question arose in a contest between the executor or administrator of a deceased person's estate and the donee of the deceased person or between the donor and donee. Manifestly under the evidence set the donee cannot testify as to transactions or conversations of the deceased person in an action where the executor or administrator is the opposite party. But such is not the case here. The estate of James Rankin is in no way involved here. This is a suit by this donee against her, the maker of this note.

Even if there had been no gift of this note to the plaintiff by the payee, she can, nevertheless, maintain this suit. While the plaintiff does not contend that there was no gift of this note to her but contends that the evidence is uncontradicted and conclusive, counsel has urged the contrary in his brief and by misquoting the evidence and stating uncontradicted

conjectures, made a plausible case.

Counsel for the defendant states that it is not reasonable to believe that James Rankin did not keep the note in his safety deposit box, yet the evidence is uncontradicted that after the maker gave it to the plaintiff she kept it in her home. The evidence as to the daughter entering the safety box after the death of James Rankin and removing its contents was objected to and has no place in this record. It does not appear that this note was there. In fact, the evidence shows it was not. The evidence of the gift has been detailed and we shall not repeat it but rely on the facts as they appear in this record. The gift of this note by the husband to his wife is sufficiently shown. Their close relationship should require no more evidence as to the defendant Race.

"Close relationship between the parties such as husband and wife * * * creates a presumption that a delivery of property from one to the other, without explanatory words, was intended as a gift." 28 C. J. p. 672, and cases cited (So held of money given by husband to wife).

Bromwell v. Estate of Bromwell, 139 Ill. 424; Kartun v. Kartun, 347 Ill. 510. From the fact that a father handed money to his daughter, saying "Here take it and keep it," it was held to be an absolute gift. O'Brien v. O'Brien, 185 Ill. App. 144.

The defendant did not ask the daughter whether or not she found the note in the safety box and he called her to the stand and over plaintiff's objection examined her on her entry of the box.

So it would appear from the facts as they appear in this record that there is no doubt that plaintiff was given the note by James Rankin, who did not endorse it, presumably because he "did not know enough to draw a note or mortgage", and had his brother and the defendant do all that kind of work for him, and he didn't think it was necessary.

It would appear from the statement that was made by the plaintiff in this action that the gift is clearly shown by the evidence, by James Rankin, deceased, to his then wife, the plaintiff.

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Counsel for the defendant states that it is not reasonable

to believe that James Rankin did not keep the note in his safety deposit box, yet the evidence is uncontradicted that after the maker gave it to the plaintiff she kept it in her home. The evidence as to the daughter entering the safety box after the death of James Rankin and removing its contents was objected to and has no place in this record. It does not appear that this note was there. In fact, the evidence shows it was not. The evidence of the gift has been detailed and we shall not repeat it but rely on the facts as they appear in this record. The gift of this note by the husband to his wife is sufficiently shown. Their close relationship should require no more evidence as to the defendant's case.

"Close relationship between the parties such as husband and wife" "creates a presumption that a delivery of property from one to the other, without explanatory words, was intended as a gift." 28 G. J. p. 672, and cases cited (no hold of money given by husband to wife).

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So it would appear from the facts as they appear in this

record that there is no doubt that plaintiff was given the note by James Rankin, who did not involve it, presumably because he "did not know enough to draw a note or mortgage," and had his brother and the defendant do all that kind of work for him, and he didn't think it was necessary.

It would appear from the statement that was made by the

plaintiff in this action that the gift is clearly shown by the evidence, by James Rankin, deceased, to his then wife, the plaintiff.

She may recover on the note on other grounds also.

It further appears that James Rankin died May 13, 1941, leaving the plaintiff, his widow, and Zella Rankin, his daughter, and James Boyd Rankin, his son, his only heirs at law. The children had long been adults and lived with the mother. James Boyd Rankin died in 1934, three years later. James Rankin's estate was solvent and there was no administration proceeding on it. There was no necessity for it. For three years this mother, son and daughter, sole heirs of the deceased, all adults and living together, were apparently satisfied about the mother's right or title to this note and no heir of this estate has at any time since made any claim against it. The living daughter was a witness in this case for the mother and the son would no doubt have been if he were alive.

The statutes of this state do not require the probate of a will or the administration of an estate. The heirs may settle an estate without administration in the absence of debts, and a settlement made by them among themselves is binding and after making distribution, the distributees may sue in their own name. In support of the foregoing statement a number of cases were called to the attention of this court by the plaintiff. Evidence of this as stated was not necessary because this record shows a gift to the plaintiff and the heirs probably knew that and did not take further action. By their silence though, they settled this note ownership by leaving it with the mother. Under that theory, she could also maintain this suit.

There is another reason why the plaintiff can maintain this suit, and that is that she is the legal holder of the note and she may sue thereon and the court will not hear evidence as to the equitable title of another except to permit a defense to be

She may recover on the note on other grounds also.

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leaving the plaintiff, his widow, and Della Rankin, his daughter,

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Boyd Rankin died in 1934, three years later. James Rankin's estate

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the equitable title of another except to permit a defense to be

shown as against him who has the equitable title. Aaron v. Dausch, 314 Ill. App. 267; Replogle v. Scott, 299 Ill. App. 270; Kasunas v. Wright, 286 Ill. App. 554; Dillon v. Elmore, 361 Ill. 356.

Eugene L. Race has shown no defense to this note in the hands of James Rankin, nor has he any defense as against anyone else, the plaintiff, the daughter, or the son were he alive. He has had a fair trial and should be compelled to pay his debt.

Therefore, from the facts as they are in this record, we are satisfied that the judgment that was entered by the court is proper, and therefore it is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

shown as against him who has the contradictory title. Adams v. Adams, 314 Ill. App. 237; Adams v. Adams, 329 Ill. App. 270; Adams v. Adams, 336 Ill. App. 554; Adams v. Adams, 351 Ill. 733.

Eugene L. Adams has shown no defense to this note in the hands of James Larkin, nor has he any defense as against anyone else, the plaintiff, the daughter, or the son were he alive. He has had a fair trial and should be compelled to pay his debt. Therefore, from the facts as they are in this record, we are satisfied that the judgment that was entered by the court is proper, and therefore it is affirmed.

JUDGMENT AFFIRMED.

BURKE, P. J. AND KILLY, J. CONCUR.

42274

BISMARCK HOTEL COMPANY,
(Plaintiff) Appellee,

v.

JOHN F. TYRRELL, JOHN F. HIGGINS,
and MYER H. GLADSTONE,
(Defendants)

JOHN F. HIGGINS and MYER H. GLADSTONE,
Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

318 I.A. 230²

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On December 12, 1930, plaintiff (then the Randolph Hotel Company) caused a judgment by confession to be entered in the Municipal Court of Chicago against John F. Tyrrell, John F. Higgins and Myer H. Gladstone, lessees under the terms of a lease, for the sum of \$2,795.00 and costs. March 20, 1941, plaintiff filed in the same court a suit described as a suit "to revive" this judgment. A statement of claim was filed reciting the recovery of the judgment for the amount named, with costs of \$41.90; that the judgment was in full force and that there was due thereon \$1,985.62 with interest at 5% from the date of entry.

Gladstone answered; Higgins, on May 16, 1941, was defaulted; Tyrrell was not served. November 12, 1941, Gladstone filed an amended answer. It admitted the recovery of the judgment, as averred, but set up as a defense payment by him of numerous items to the amount of \$1,812.50. It also averred payments by John F. Higgins on May 12, 1931, of \$300.45, and on April 30, 1931, of \$512.50. Plaintiff replied to the amended answer admitting payment of the items set up in Gladstone's answer except one for \$100 alleged to have been made on March 13, 1931; another of \$100 on April 7, 1931; another on April 29, 1931; for \$300.00; and yet another on May 12, 1931, for the sum of \$300.45; also the alleged payment on April 30, 1931, of

BISMARCK HOTEL COMPANY,
(Plaintiff) Appellee,

v.

JOHN F. TYRRELL, JOHN F. HIGGINS,
and MYR H. GLADSTONE,
(Defendants)

JOHN F. HIGGINS and MYR H. GLADSTONE,
Appellants.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On December 12, 1930, plaintiff (then the Bismarck Hotel Company) caused a judgment by confession to be entered in the Municipal Court of Chicago against John F. Tyrrell, John F. Higgins and Myr H. Gladstone, lessees under the terms of a lease, for the sum of \$2,752.00 and costs. March 20, 1941, plaintiff filed in the same court a suit described as a suit "to revive" this judgment. A statement of claim was filed reciting the recovery of the judgment for the amount named, with costs of \$41.00; that the judgment was in full force and that there was due thereon \$1,253.62 with interest at 5% from the date of entry.

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\$512.50. The reply denied that any of these last named payments had been made on the judgment, and further set up that after the entry of the judgment defendants continued to occupy the premises and pay current rent therefor; that these payments were made on the current rent and not on the judgment. Plaintiff admitted defendants were entitled to additional credit of \$75.00 paid December 17, 1934, and the sum of \$79.73 by dividends received from the account of Gladstone in the defunct Chicago Bank of Commerce, leaving a balance due of \$1,369.67 with interest from December 12, 1930.

The cause was submitted to the court without a jury. By agreement the judgment against Higgins on May 16, 1941, was vacated. The court found the issues against defendants Gladstone and Higgins, and that the judgment as to them, of December 12, 1930, for \$2,795.00, should be revived, and "whereas part of the judgment and costs having been paid, judgment against defendants Myer H. Gladstone and John F. Higgins, Twelve Hundred Fifty and 00/100 Dollars (\$1,250.00) and costs of this proceeding should be entered."

December 18, 1941, defendants made a motion for a new trial on the ground of newly discovered evidence. The motion was based on an affidavit of Myer H. Gladstone, which stated that the amount found due was too much; that he had discovered four checks, one dated March 3, 1931, for \$100.00, drawn on the Union Bank of Chicago, another of May 15, 1931, drawn on the Foreman-State National Bank for \$100.00, one dated May 26, 1931, on the Union Bank of Chicago for \$100.00, all these checks being endorsed by Gladstone to Campbell, Clithero and Fisher, who were attorneys for the plaintiff. The affidavit stated that none of these was available at the time of the trial, but that on Tuesday, December 12, 1941, Myer H. Gladstone visited his father who was ill, and in searching through his bureau found a check record book and a number of checks, among which were these; that he does not know how the same came into possession of his

\$512.50. The reply denied that any of these last named payments had been made on the judgment, and further set up that after the entry of the judgment defendants continued to occupy the premises and pay current rent thereon; that these payments were made on the current rent and not on the judgment. Plaintiff admitted defendants were entitled to additional credit of \$75.00 paid December 17, 1934, and the sum of \$75.75 by dividends received from the account of Gladstone in the defunct Chicago Bank of Commerce, leaving a balance due of \$1,369.87 with interest from December 18, 1930.

The cause was submitted to the court without a jury. By agreement the judgment against Higgins on May 18, 1931, was vacated. The court found the issues against defendants Gladstone and Higgins, and that the judgment as to them, of December 18, 1930, for \$2,752.00, should be revived, and "whereas part of the judgment and costs having been paid, judgment against defendants Myer H. Gladstone and John C. Higgins, Twelve Hundred Fifty and 00/100 Dollars (\$1,250.00) and costs of this proceeding should be entered."

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father. The court denied the motion and defendants appeal from the judgment which was entered on November 19, 1941.

It is said in the first place the judgment is not in proper form; that it should have been that the original judgment be revived and that execution issue. That such would have been the practice formerly may be conceded. Waterbury Nat'l. v. Reed, 136 Ill. App. 378, affirmed in 231 Ill. 246, 83 N. E. 820; Motel v. Andracki, 299 Ill. App. 166, 170, 19 N. E. (2d) 832.

However, Section 55 of the Civil Practice Act (Hurd's Anno. Stat., Chap. 110, par. 179) provides:

"It shall not be necessary to use a writ of Scire facias, but any relief which heretofore might have been obtained by Scire facias may be had by employing an ordinary civil action at law."

By virtue of Sections 19 and 20 of the Municipal Court Act the Municipal Court of Chicago is given power to adopt rules of practice such as may be deemed necessary or expedient, a power which any court should have a right inherently to exercise. Wilson v. Gill, 279 Ill. App. 487, 491. Rule 49 of the Municipal Court adopts Sec. 55 of above statute as a rule of court.

Defendants made no objection to the form of the judgment when it was entered. The trial proceeded on the issue of whether the judgment had been paid, and both parties introduced evidence on that issue. The summons that issued from the Municipal Court was in the usual form of a summons in contract. While the form of the judgment is not according to the ancient usage, we find no substantial injury to defendants. Under similar circumstances under the older practice, a judgment for plaintiff similar to that entered here in an action of this kind was affirmed, although the form of the judgment was criticized. Robinson v. Brown, 82 Ill. 279, 280. In the reply brief defendants say their complaint is that the judgment "did not contain an order that execution issue therefor", that is, that execution issue for the judgment as revived. This objection hardly seems fitting on the part of a defendant. However, we assume execution would issue on

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"It shall not be necessary to use a writ of habeas corpus, but any relief which heretofore might have been obtained by habeas corpus may be had by employing an ordinary civil action at law."

However, Section 53 of the Civil Practice Act (Ill. Ann. Stat., Chap. 110, par. 175) provides:

"It shall not be necessary to use a writ of habeas corpus, but any relief which heretofore might have been obtained by habeas corpus may be had by employing an ordinary civil action at law."

By virtue of Sections 19 and 20 of the Municipal Court Act the Municipal Court of Chicago is given power to adopt rules of practice such as may be deemed necessary or expedient, a power which any court should have a right inherently to exercise. Waters v. v. Reed, 128 Ill. App. 378, affirmed in 231 Ill. App. 230; Waters v. Waters, 231 Ill. App. 188, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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such a judgment entered in any court, either under Section 4 of Chapter 77 of the Illinois Revised Statutes, p. 1922, or in the Municipal Court by reason of Section 63 of the Municipal Act, Ill. Rev. Stats., Chap. 37, par. 423, p. 1059.

The only contention going to the merits of the matter is that the court erred in including accrued interest on the old judgment in the amount for which judgment was entered on the new one. This, it is said, amounted to allowing interest upon interest, in other words interest compounded. Tracey v. Shanley, 311 Ill. App. 529, 534, is cited. In other words, the defendants insist that all the credits for payments made by them should be credited upon the judgment itself rather than upon the interest which accrued thereon. In support of this theory they point out plaintiff's manager testified the balance due on the judgment was \$1,369.67 and that the bookkeeper, who also testified, said the payments to which she testified were made on the judgment and did not say that anything was credited upon interest. The Tracey-Shanley suit was not on a judgment but on notes. It turned on a question of tender, and for that reason is not in point here. In computing the amount due the court applied payments made first to the satisfaction of accrued interest. While technically the interest was only incidental to the judgment, we hold under the authorities this computation was proper. In re: Estate of Cunningham, 311 Ill. 311, 317; Miller v. Howes, 58 Ill. App. 667; Brand v. Reuter, 200 Ill. App. 42, 44, Lee v. Meredith, 249 Ill. App. 274, 277.

Nor do we think the court erred in denying the motion of defendants for a new trial on the ground of newly discovered evidence. The motion was made within 30 days after the entry of the judgment and its allowance was therefore largely within the discretion of the court. From the time of the entry of the original judgment, December 12, 1930, until the expiration of the lease on April 30, 1931, defendants continued to occupy the premises and made payments which were applied on the current rent which became due after the entry of the judgment. The burden was upon defendants to show that payments

such a judgment entered in any court, either under Section 4 of Chapter 77 of the Illinois Revised Statutes, c. 192, or in the Municipal Court by reason of Section 83 of the Municipal Act, Ill. Rev. Stat., Chap. 37, par. 423, p. 1028.

The only contention going to the merits of the matter is that the court erred in including accrued interest on the judgment in the amount for which judgment was entered on the new one. This, as is said, amounted to allowing interest upon interest, in other words interest compounded. Tracey v. Shanley, 311 Ill. App. 629, 634, is cited. In other words, the defendants insist that all the credits for payments made by them should be credited upon the judgment itself rather than upon the interest which accrued thereon. In support of this theory they point out plaintiff's manager testified the balance due on the judgment was \$1,389.87 and that the bookkeeper, who also testified, said the payments to which the credits were made on the judgment and did not say that anything was credited upon interest. Tracey-Shanley suit was not on a judgment but on notes. It turned on a question of tender, and for that reason is not in point here. In computing the amount due the court applied payments and first to the satisfaction of accrued interest. While technically the interest was only incidental to the judgment, as held under the authorities this computation was proper. In re: Estate of Charles H. Tracey, 311 Ill. 317; Miller v. Hayes, 68 Ill. 427; Tracey v. Tracey, 200 Ill. App. 42, 44; Lee v. Leighton, 443 Ill. App. 674, 677.

Now do we think the court erred in denying the entry of a judgment for a new trial on the ground of newly discovered evidence. The motion was made within 30 days after the entry of the judgment and its allowance was therefore largely within the discretion of the court. Upon the time of the entry of the original judgment, November 12, 1930, until the expiration of the term on April 30, 1931, defendants continued to occupy the premises and make payments which were applied on the current rent which became due after the entry of the judgment. The burden was upon defendants to show that payments

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made by them were upon the judgment. These checks were all paid through Campbell, Clithero and Fisher, attorneys for plaintiff. The rent payable was \$512.50 per month for the four month period from January 1 to May 1, 1931, a total of \$2,050.00. There is nothing to show that there was any direction that these four checks should be applied on the amount of the judgment, and plaintiff, therefore, had a right, if it saw fit, to apply the same on current rent. The books were brought into court and the trial judge gave careful consideration to the allowance of different items. There is no error of substance in the record. The judgment will be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

made by them were upon the judgment. These checks were all paid through Campbell, Oltmans and Fisher, attorneys for plaintiff. The rent payable was \$12.50 per month for the four month period from January 1 to May 1, 1931, a total of \$50.00. There is nothing to show that there was any direction that these four checks should be applied on the amount of the judgment, and plaintiff, therefore, had a right, if it saw fit, to apply the same on current rent. The books were brought into court and the trial judge gave careful consideration to the allowance of different items. There is no error of substance in the record. The judgment will be affirmed.

ALFRED.

O'Connor and McGurly, J.J., concur.

42322

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. ALBERT A. CIBIC,
Appellant,

v.

JOSEPH GEARY, WENDELL E. GREEN,
and WILLIAM P. RONAN, as Members of
the Civil Service Commission of the
City of Chicago,
Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

318 I.A. 231'

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On October 16, 1941, Cibic, for himself and others in like situation, filed his complaint praying a mandamus against defendants, members of the Civil Service Commission of the City of Chicago. The prayer of the petition is that the Commission may be ordered to hold a promotional examination for the position of "engineer custodian" of the Board of Education, Branch II, Class F. Grade 2 of the Service. Relators are school firemen of the Board of Education in the same branch, class and grade of service as engineer custodians. Engineer custodian, however, is a higher rank of service than that of school fireman, and the position draws a substantially higher salary. The petition prays that in the event relators pass the promotional examination requested their names may be certified to the Board of Education to fill any position of engineer custodian then vacant or occupied by persons temporarily appointed, or "filled by certification from the eligible list dated October 2, 1941, resulting from the original entry examination". Defendants made a motion to strike, which was overruled, and they then answered. The cause was tried by the court, evidence taken and there was a finding for defendants and judgment dismissing the complaint. Plaintiff appeals.

The case, in so far as relators seek to attack the eligible

PEOPLE OF THE STATE OF ILLINOIS,
Ex rel. ALBERT A. GIBIE,
Appellant,

v.
JOSEPH GEARY, WINDYBELL E. GREEN,
and WILLIAM F. ROMAN, as members of
the Civil Service Commission of the
City of Chicago,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

3181 A 381

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On October 16, 1941, Gibie, for himself and others in like situation, filed his complaint praying a mandamus against defendants, members of the Civil Service Commission of the City of Chicago. The prayer of the petition is that the Commission may be ordered to hold a promotional examination for the position of "engineer custodian" of the Board of Education, Branch II, Class F, Grade 2 of the Service. Relators are school firemen of the Board of Education in the same branch, class and grade of service as engineer custodians. Engineer custodian, however, is a higher rank of service than that of school fireman, and the position draws a substantially higher salary. The petition prays that in the event relators pass the promotional examination requested their names may be certified to the Board of Education to fill any position of engineer custodian then vacant or occupied by persons temporarily appointed, or "filled by certification from the eligible list dated October 2, 1941, resulting from the original entry examination". Defendants made a motion to strike, which was overruled, and they then answered. The cause was tried by the court, evidence taken and there was a finding for defendants and judgment dismissing the complaint. Plaintiff appeals.

The case, in so far as relators seek to attack the eligible

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list published on October 2, 1941, is similar to the case of People v. Geary, No. 42144, heretofore decided, in which this court held an original examination was not void and illegal for the sole reason that an original and a promotional examination were held at the same time. We adhere to that ruling.

The relators rely on Section 9 of the Civil Service Act (Smith-Hurd's Anno. Stat., Chap. 24 1/2, §47) and Rule 5 of the Civil Service Commission. Section 9 provides that examination for promotion shall be competitive among the members of the next lower rank such as desire to submit themselves for examination. Rule 5 provides that a promotional examination shall be held when the next lower rank, whether in the same or a lower grade, contains two or more eligible persons desirous of taking the examination. The relators made application to register for such an examination prior to beginning this suit but were refused permission so to do, and thereupon this suit was begun.

There is practically no dispute as to the facts. On October 28, 1939, after proper notice, the Commission held at the same time and place two examinations, for the position of custodian engineer. One was promotional. The other original. The persons taking the promotional were limited to firemen who were of the next rank lower than engineer custodians. The original examination was open to all persons; the promotional limited to those who were in the service of the Board of Education. The result of the examination was to produce the names of 105 persons eligible to appointment to this position. All have been certified by the Commission, 11 have waived their right. There is at the present time no name of any individual on the list who is eligible for appointment to this position of engineer custodian, but any one of the 11 who waived may within a year from the time of his certification, withdraw his waiver and thus become eligible. Withdrawal may be made by any one of them any day prior to the expiration of one year from the date on which he waived. In the meantime, 10 temporary appointments have been made. These temporary appointments are authorized by Section 10 of the City Civil Service Act, which provides:

been made. These temporary appointments are authorized by Section 10 date on which he waived. In the meantime, 10 temporary appointments have by any one of them any day prior to the expiration of one year from the withdrawal his waiver and then become eligible. Withdrawal may be made

the 11 who waived may within a year from the time of his certification for appointment to this position of engineer custodian, but any one of the present time no name of any individual on the list who is eligible certified by the Commission, if have waived their right. There is at 108 persons eligible to appointment to this position. All have been Education. The result of the examination was to produce the names of promotional limited to those who were in the service of the Board of custodians. The original examination was open to all persons; the were limited to firemen who were of the next rank lower than engineer

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promotional examination shall be held when the next lower rank, whether eligible to submit themselves for examination. Rule 5 provides that a shall be competitive among the members of the next lower rank such as Service Commission. Section 9 provides that examination for promotion (Smith-Kurd's Anno. Stat., Chap. 24 1/2, 1947) and Rule 5 of the Civil The referees rely on Section 9 of the Civil Service Act

same time. We adhere to that ruling. reason that an original and a promotional examination were held at the held an original examination was not void and illegal for the sole People v. Geary, No. 42144, heretofore decided, in which this court list published on October 2, 1941, is similar to the case of

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" * * * To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the commission, make temporary appointments to remain in force not exceeding sixty days, and only until regular appointments under the provisions of this act can be made."

Section 9 of the Act provides: "In all cases where it is practicable, that vacancies shall be filled by promotion".

The actual situation here is that there are 10 temporary appointments to this position, any one of which may be ended by the withdrawal of any one of the 11 who has been certified and waived his appointment. We hold that the question of whether under such circumstances a promotional examination shall be held is a matter within the discretion of the Commission. When and if the time for waiver of two or more of these 11 shall have expired, the relators have a clear right to demand a promotional examination shall be held, but until such time the matter of giving such an examination is in the discretion of the Commission.

It is unquestioned law the writ of mandamus will not issue except to enforce a clear and undoubted right. The right here has neither of these qualities. The judgment of the trial court will therefore be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

" * * * To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the Commission, make temporary appointments to vacant positions not exceeding sixty days, and only such regular appointments under the provisions of this Act can be made."

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practicable, that vacancies shall be filled by promotion."

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appointments to this position, any one of which may be ended by the

withdrawal of any one of the 11 who has been certified and served his

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circumstances a promotional examination shall be held is a matter

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have a clear right to demand a promotional examination shall be held,

but until such time the matter of giving such an examination is in

the discretion of the Commission.

It is unquestioned law the writ of mandamus will not issue

except to enforce a clear and unadmitted right. The right here has

neither of these qualities. The judgment of the full court will

therefore be affirmed.

APPEAL.

O'Connor and McGurly, JJ., concur.

42336

LOUIS KULESZA and FRANK HEYNAR,
Appellants,

v.

ALLIANCE PRINTERS & PUBLISHERS, INC.,
POLISH NATIONAL ALLIANCE, a Corporation,
STEVE KALISZ and STELLA LAKOMSKI,
Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

318 I.A. 231

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued to recover damages for libels alleged to have been published of and concerning them by defendants, maliciously. The complaint was filed February 18, 1940. It alleged defendant Alliance Printers & Publishers, Inc. was an Illinois business corporation controlled by the Polish National Alliance, an Illinois fraternal corporation, through the device of the directors of the last named holding all the stock of the first named corporation.

The publishing company prints in the Polish language and distributes a daily newspaper in the City of Chicago, the "Dziennik Zwiazkowy (Zgoda)", which is read by more than 35,000 persons. Defendants Kalisz and Lakomski paid the publishing corporation to print in their paper two articles concerning plaintiffs - one on April 1 and the other on April 22, 1939. The articles, in Polish with correct translations into English, are set up in the complaint and appear in the record.

Defendants severally answered the complaint. There were motions to strike the answers, which admitted some, denied other, averments. Judge Fisher, who heard the motions, struck part of the averments and refused to strike others. An order was entered holding the writings libellous per se, and on admissions made in the answers the cause was

LOUIE LUTESSA and FRANK HEYMAR,
Appellants,

v.

ALLIANCE PRINTERS & PUBLISHERS, INC.,
POLISH NATIONAL ALLIANCE, a Corporation,
STEVE KALISZ and STEPHAN LAKOMSKI,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE MARCH TO DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued to recover damages for libels alleged to have been published of and concerning them by defendants, maliciously. The complaint was filed February 18, 1940. It alleged defendant Alliance Printers & Publishers, Inc. was an Illinois business corporation controlled by the Polish National Alliance, an Illinois fraternal corporation, through the device of the directors of the last named holding all the stock of the first named corporation.

The publishing company prints in the Polish language and distributes a daily newspaper in the City of Chicago, the "Gazeta Zwiazkowy (Zgoda)", which is read by more than 25,000 persons. Defendants Kalisz and Lakomski paid the publishing corporation to print in their paper two articles concerning plaintiffs - one on April 1 and the other on April 22, 1939. The articles, in Polish with correct translations into English, are set up in the complaint and appear in the record.

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set for hearing for the assessment of damages. Defendants moved for leave to amend their answers to permit them to set up by way of mitigation that plaintiffs had, prior to the publication of the libels concerning them complained of, published and written similar provocative charges against some of defendants. Their motion was denied. The cause was assigned for hearing to Judge Trude. Evidence was taken. There was a finding of guilty with damages of \$1.00 assessed against each defendant in favor of each plaintiff with judgments on each finding.

Plaintiffs are not satisfied with this technical vindication. They appeal to this court and ask what they call "substantial justice", suggesting the judgments entered should be reversed and judgment entered by this court here for \$15,000.00.

In the recent case of Shaw v. Courtney, et al., On Appeal of Leddy, 46 N. E. (2d) 170, we have held that under Section 50 of the Civil Practice Act more than one judgment may be entered in the same cause, as was done here and in that case. Whether plaintiffs here desire several judgments in this court against the individual defendants for \$15,000.00, or a joint judgment against all of them for that amount, we are not informed by their brief.

As already stated, there is a finding of guilty as to each of the defendants in favor of each of the plaintiffs, with judgment thereon. There is no contention by defendants there was error in such findings and judgments.

The sole question for decision on this record seems to be whether there should be a substantial increase in the amount of damages assessed.

The facts seem to be as follows. Years since, Elbert R. Robinson applied for and obtained letters patent on an invention. Thereafter he brought suits against persons who he claimed were infringing his patent. He also induced between three and four thousand persons severally to advance money to him for use in prosecuting the suits, upon his agreement that he would use the money for that purpose, he giving a supposed

set for hearing for the assessment of damages. Defendants moved for leave to amend their answers to permit them to set up by way of mitigation that plaintiffs had, prior to the publication of the libels concerning them complained of, published and written similar provocative charges against some of defendants. Their motion was denied. The cause was assigned for hearing to Judge Trade. Evidence was taken. There was a finding of guilty with damages of \$1.00 assessed against each defendant in favor of each plaintiff with judgments on each finding.

Plaintiffs are not satisfied with this technical vindication. They appeal to this court and ask what they call "a substantial justice", suggesting the judgments entered should be reversed and judgment entered by this court here for \$15,000.00.

In the recent case of Shaw v. Courtney, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

As already stated, there is a finding of guilty as to each of the defendants in favor of each of the plaintiffs, with judgment thereon. There is no contention by defendants there was error in such findings and judgments.

The sole question for decision on this record seems to be whether there should be a substantial increase in the amount of damages assessed.

The facts seem to be as follows. Years since, Albert E. Robinson applied for and obtained letters patent on an invention. Thereafter he brought suits against persons who he claimed were infringing his patent. He also induced between three and four thousand persons severally to advance money to him for use in prosecuting the suits, upon his agreement that he would use the money for that purpose, he giving a supposed

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note to each of them for the money advanced, payable out of the proceeds when, and if, he should succeed in recovering damages for the infringement. Plaintiffs own some of these notes. Robinson died in 1925. A number of persons holding similar notes came together and organized a club known as the "Elbert R. Robinson Club of Chicago". The purpose of the organization was to enforce their several rights as holders of the notes. Officers were elected and committees appointed to act in behalf of all the members, with authority to sue. Plaintiffs Heynar and Kulesza were president and secretary, respectively, of ^{one of} these clubs and members of the committee appointed. There were several like clubs organized. One witness puts the number at seven or eight. Contributions of members were solicited for the purpose of protecting the supposed rights of the members. The situation became confused. There was rivalry, bad feeling and competition between some of the groups.

At one time some of the interested persons interviewed then Senator James Hamilton Lewis in regard to the situation. His remarks at a meeting held October 24, 1936, are in the record. It appears that he suggested: "What you folks ought to do would be to get together, and then I would do all I could to get the patent out as a new patent in such name as they would agree upon, and then after you got your patent you could settle in the Courts what share each had a right to have". It further appears from his remarks that the patent had expired and that the authorities in Washington found it difficult to know (assuming that it should be re-issued) who would be the lawful owner of the re-issued patent.

The publications complained of were printed in Polish, were giving a heading "Extra" and were signed by Hugo Radau, "Attorney for Kalisz and Lakomski". Radau originally was made a party defendant, but there was a severance as to him. He paid for the insertion of these two publications as advertising, and the articles appeared in the advertising section of the paper. There was no compliance with Section 234, Title 39 of the U. S. Code, Anno., which requires such articles

note to each of them for the money advanced, payable out of the proceeds when, and if, he should succeed in recovering damages for the infringement. Plaintiff's own sons of these notes. Robinson died in 1928. A number of persons holding similar notes came together and organized a club known as the "Albert B. Robinson Club of Chicago". The purpose of the organization was to enforce their several rights as holders of the notes. Officers were elected and committees appointed to act in behalf of all the members, with authority to sue. Plaintiff's H. J. and K. J. were president and secretary, respectively, of these clubs and members of the committees. There were several like clubs organized. One witness puts the number at seven or eight. Contributions of members were solicited for the purpose of protecting the supposed rights of the members. The situation became confused. There was rivalry, bad feeling and competition between some of the groups.

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to be plainly marked as an advertisement.

The publications are in the record verbatim, but to quote in full would unduly extend this opinion. In substance the charge was rather indirectly and clumsily made that plaintiffs, in the solicitations of funds for the purposes of their clubs, were trying to obtain money under false pretenses.

The brief of plaintiffs covers thirteen points with numerous citations of authorities. As to most of these points the law as stated is not questioned. We do not doubt a party may be libeled by a writing which does not mention his name. The court so held in this case. Defendants do not contend to the contrary. We do not question that remarks of officials are not privileged unless made in connection with the exercise of the duties of their office; that the fact a libelous article was taken by the newspaper as an advertisement does not justify the publication of it if it is, in fact, libelous, or mitigate the wrong of publishing it. It is not a defense to an action for libel to show that it is merely a repetition of what some other person may have said. We also agree that punitive damages are not limited to cases of actual malice where the publication has been made carelessly and recklessly; that mitigating circumstances may not be shown for the purpose of reducing actual damages; that the factual truth of a libel as justification cannot be proved unless it has been specifically pleaded; that it is ordinarily unethical for an attorney to testify for his client in the same proceeding in which he represents him. These propositions are, we take it, unquestioned law, and it is unnecessary to analyze the numerous cases cited in support of the propositions.

The real and only question for this court to decide is whether the trial court abused its discretion in allowing only nominal damages. The finding of the court in a case tried without a jury is entitled to the same weight as the verdict of a jury in a jury case. There is no proof here of actual damages. In O'Malley v. Illinois Printing & Publishing Co., 194 Ill. App. 544, this court

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affirmed a judgment for \$7500 entered on the verdict of a jury. To approve or affirm a judgment entered on the verdict of a jury is one thing to reverse it is quite another. There was proof of actual damages in the O'Malley case and of repeated false charges, distinctly naming the plaintiff, which indicated much malice. In Hintz v. Graupner, 37 Ill. App. 510, affirmed in 138 Ill. 158, it does not appear what the amount of the judgment was. In Brown v. Publishers George Knapp Co., 213 Mo. 611, 132 S. W. 474, a judgment of \$5,000 actual and \$5,000 punitive damages was held not to be so excessive as to require a reversal. In Scott v. Times Mirror Co., 181 Cal. 345, 184 Pac. 672, there was a judgment on the verdict of a jury for \$7,500 actual damages and for \$30,000 as punitive damages, with judgment against defendant for the full amount. Without going into the facts of the case in detail, they were not in any way similar to those which appear here. On the contrary in that case the defendant owned a newspaper which had written many repeated and pernicious libels against the plaintiff, showing an intention ~~on the part~~ to destroy his reputation in the community, if that was possible. In Richardson v. Public Ledger Co., 260 Pa. 602, 103 Atl. 355, the libel was a charge that plaintiff had mismanaged a children's home and day nursery. There is no statement of the amount of damages allowed. The opinion says that the verdict was substantial "and plaintiff proved actual losses covering much the greater part of the jury's award".

We have examined all the above cases cited by plaintiffs to this point. To summarize, Plaintiffs' exhaustive brief does not point out a single case where an Appellate tribunal has reversed a judgment entered on the verdict of a jury or a finding of the court for failure of the trial judge or jury to award punitive damages where no actual monetary damages were proved. No actual monetary damages were proved here.

The evidence indicates the legal rights of these plaintiffs in

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We have examined all the above cases cited by plaintiff to this point. To summarize, Plaintiff's expert did not point out a single case where an appellate tribunal has reversed a judgment entered on the verdict of a jury or a finding of the court for failure of the trial judge or jury to award punitive damages where no actual monetary damages were proved. No actual monetary damages were proved here.

The evidence indicates the legal rights of these plaintiffs in

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this patent were at best doubtful and dubious. The trial judge properly exercised his discretion in the direction of community peace and quiet. The honest, if foolish, purposes of plaintiffs have been vindicated. The illegal and improper conduct of defendants has been rebuked. The law also has been vindicated, and its wisdom demonstrated. The judgment will be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

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APPROVED.

O'Connor and Rosenthal, Jr., counsel.

42345

ELSIE B. SPIEGEL,
Appellee,

v.

TOBY PROVUS and ISADORE PROVUS, et al.,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

318 I.A. 232

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This case was before this court on a former appeal where a decree of foreclosure entered October 29, 1936, was reversed and the cause remanded for error in refusing to allow an item of \$2,500.00, which this court held had been remitted to the plaintiff for a valuable consideration. (Siegel v. Provus, 291 Ill. App. 603.) Our remanding order was filed in the trial court July 12, 1937. The order reinstating the cause was not entered, until December 2, 1940. November 14, 1941, the cause was again referred to a master, as the order states, "to take further proof and to report". When the matter came up before the master plaintiff declined to offer further proof. Defendants, over plaintiff's objection, were allowed to give evidence of an alleged tender said to have been made ob October 22, 1936. The master made a supplementary report finding the total amount due to be \$5,636.07 after allowing defendants credit for the item \$2,500.00 and recommended foreclosure for that amount.

By objection and exception defendants contend that there should have been a finding that a valid and sufficient tender was made by them on October 22, 1936, and that interest should not have been allowed after that date. We have given careful consideration to the evidence before the master on this issue. This testimony was given by Mr. Fisher, who at that time and since has been acting as defendants' attorney, and by defendant Isadore Provus. It will be noticed that the supposed tender is said to have been made in court prior to the entry of the former

ELIAS B. SPILGEMAN,

Appellee,

v.

TOBY PROVOSE and ISIDORE PROVOSE, et al.,
Appellants.

APPEAL FROM
CIRCUIT COURT,
CLAY COUNTY.

318 LA. 232

MR. PRESIDING JUSTICE WATCHETT DELIVERED THE OPINION OF THE COURT.

This case was before this court on a former appeal where a

degree of foreclosure entered October 22, 1936, was reversed and the

cause remanded for error in refusing to allow an item of \$2,500.00,

which this court held had been remitted to the plaintiff for a valuable

consideration. (Spilgeman v. Provoe, 311 La. 408, 1936.) Our remanding

order was filed in the trial court July 12, 1937. The other remanding

the cause was not entered, until December 1, 1940. November 1, 1941, in

cause was again referred to a master, as the order states, "to take

further proof and to report". When the master came up before the court

plaintiff declined to offer further proof. Defendants, over plaintiff's

objection, were allowed to give evidence of an alleged tender said to

have been made on October 22, 1936. The master made a ruling in favor

report finding the total amount due to be \$1,000.00 after allowing

defendants credit for the item \$2,500.00 and recommending for closure

for that amount.

By objection and exception defendants contend that there should

have been a finding that a valid and sufficient tender was made by

them on October 22, 1936, and that interest should not have been allowed

after that date. We have given careful consideration to the evidence

before the master on this issue. This testimony was given by the witness

who at that time and since has been acting as defendant's attorney, and

by defendant Isidore Provoe. It will be noticed that the suggested tender

is said to have been made in court prior to the entry of the master's

2.

decree which was reversed by this court. The court record, however, does not show any such tender. There was no plea of tender nor motion of record indicating any tender was made. If this defense was to have been made it should have been presented on the former appeal. No such defense was claimed either before the trial court or in this court.

Mr. Fisher in substance testifies that on October 22, 1936, in the court room he stated to attorneys for plaintiff that "my client was ready, willing and able to pay the amount due from the defendants to the plaintiff". He says: "I stated that the amount due, if the foreclosure were allowed, was \$4,500.00 in principal, interest to that date and fees which may be fixed by the Court. I said that Mr. Provus was in court ready and able to make this payment. Mr. Appel and Mr. Chernoff both stated that they refused and would refuse any payment which did not conform exactly with the amount found due by Isidore Brown, Master in Chancery."

Isadore Provus testified that he was in court on October 22, 1936, and says "I had around \$5,500.00 at the time, ready to pay the plaintiff or her counsel. It was some cash and some Government securities which could be discounted immediately. I had that money in Court. Your testimony given here was substantially the statement you made in Court. Mr. Appel and Mr. Chernoff refused to accept that money unless there was the full amount." On cross-examination this witness said that he had \$5,500.00 in cash and securities in his pocket at the time in question; that there were about three one thousand dollar bills and the other was in government securities, postal savings, but he could not recall exactly. He kept the securities in a vault in the bank, in a box that was in his wife's name; he withdrew them maybe the morning of the day in October, 1936, or maybe a day or two before, he didn't recall. He had borrowed the three one thousand dollar bills from various relatives; one from his sister-in-law, Amy Samuels; one from his mother-in-law Sarah Samuels; he didn't know whether she gave it to him in the form of a cashier's check; his wife made the arrangements. This witness also testified to a very improbable conversation with Gabriel Spiegel, son of the plaintiff, after the decision of this court, in which he testifies

because which was reversed by this court. The court, however, does not show any such finding. There is no sign of finding of record indicating any finding made. If this document was to have been made it should have been presented on the former record. No such defense was claimed either before the trial court or in this court.

Mr. Fisher in substance testifies that on October 25, 1936, in the court room he stated to attorneys for plaintiff that "my client was ready, willing and able to pay the amount due from the defendant to the plaintiff". He says: "I stated that the amount due, if the foregoing were allowed, was \$4,500.00 in principal, interest to that date and fees which may be fixed by the Court. I said that Mr. Provas was in court ready and able to make this payment. Mr. Appel and Mr. Charnoff then stated that they refused and would return my payment which did not conform exactly with the amount found due by the Court. I then in Chancery."

Isadore Provas testified that he was in court on October 25, 1936, and says "I had around \$5,500.00 at the time, ready to pay the plaintiff on her counsel. It was some cash and some government securities which could be discounted immediately. I had some money in Court. Your testimony given here was substantially the statement you made in Court. Mr. Appel and Mr. Charnoff refused to accept that money unless there was the full amount." On cross-examination this witness said that he had \$5,500.00 in cash and securities in the pocket of the shirt in his other was in government securities, postal savings, but he could not recall exactly. He kept the securities in a vault in New York, in a box that was in his wife's name; he admitted that he kept the securities in that way in October, 1936, or maybe a day or two before, he didn't recall. He had borrowed the three one thousand dollar bills from various relatives; one from his sister-in-law, Ray Marshall; one from his brother-in-law, Sarah Samuels; he didn't know whether she gave it to him in the form of a cashier's check; his wife gave the securities to him. This witness also testified to a very improbable conversation with Isadore Provas, and of the plaintiff. After the decision of this court, in which he testified

3.

that young Spiegel was still trying to collect the \$2,500.00 which this court held could not be recovered.

Upon the remandment of the cause it was the duty of the trial court to carry out the mandate of this court as made. An examination of the opinion we then rendered shows that the sole purpose of the remandment was that the credit of \$2,500.00 should be allowed. In view of the utter failure of defendants to preserve in that record any question as to the tender which it is now claimed was made, we find it quite impossible to believe that there was ever/^agood faith intantion on the part of defendants to make a tender. The subject of tender is discussed by the Supreme Court in Thompson v. Crains, 294 Ill. 270. The cases in Illinois from Webster v. French, 11 Ill. 254, are reviewed. The sum and substance of all of them is that there must be a tender made in good faith, which must in good faith be kept good. When we considered the entire lack of anything in this record either by way of petition, or motion, or pleading in the Appellate Court, and the failure to renew such tender since the mandate of this court was filed in the trial court, we find it quite impossible to believe that any tender was in fact made or that any tender has been in fact kept good. The decree will be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

that Young Spies of was still living to at least the 12,000.00 which

this court held could not be recovered.

Upon the remandment of the cause it was the duty of the trial

court to carry out the mandate of this court as made. In consideration

of the opinion we then rendered upon the sole petition of the

remandment was that the credit of \$12,000 should be allowed. In

view of the other failure of defendants to otherwise in that regard and

question as to the tender which it is now claimed was made, as this

it quite impossible to believe that there was ever good faith

intention on the part of defendants to make a tender. The subject of

tender is discussed by the Supreme Court in Thompson v. Smith, 104

Ill. 270. The cases in Illinois from Roberts v. Smith, 11 Ill. 364,

are reviewed. The sum and substance of all of them is that there must

be a tender made in good faith, which must in good faith be kept good.

When we considered the entire lack of anything in this record which

by way of petition, or motion, or pleading in the appellate court,

and the failure to renew such tender since the mandate of this court

was filed in the trial court, we find it quite impossible to believe

that any tender was in fact made or that any tender has been in fact

kept good. The decree will be affirmed.

A. L. JAMES.

O'Connor and McLaughlin, JJ., concur.

42312

EUGENE S. FERRIER, C. REX FERRIER,
and MICHAEL J. WALSH,

Appellants,

v.

VINCENT J. SHERIDAN,

Appellee.

318 I.A. 232²

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

November 26, 1937, plaintiffs, the payees of a promissory note for \$1,750, made by defendant, caused judgment to be confessed on the note for \$2,860, being the face of the note, \$940 interest, and \$170 attorney's fees. August 2, 1940, defendant filed his petition praying that the judgment be declared fully satisfied of record or in the alternative that the judgment be vacated and he be given leave to defend. August 22, 1940, an order was entered that the judgment be opened and defendant be given leave to defend, and the petition filed by defendant stand as his affidavit of defense. There was a jury trial, a verdict and judgment in defendant's favor and plaintiffs appeal.

The record discloses that May 26, 1927, plaintiffs and defendant became stockholders of the Midwest Radio Specialty Corporation which was engaged in the manufacture of electric pickups and loudspeakers for radios under a license from the owners of a patent and together with Philip H. Sheridan, defendant's brother, acquired control of the corporation and of the patent. Plaintiffs thereupon were elected officers of the corporation and conducted its business, defendant having been elected president. But the business of the company seems to have been principally carried on under the management of plaintiffs. The company owed about \$10,000 and there is evidence to the effect that each of the plaintiffs and defendant agreed to put in \$2,500. It is not clear whether plaintiffs did so,

3121A.232

RUGENE S. FRIEDMAN, G. REX FRIEDMAN,
and MICHAEL J. WALSH,
Appellants,

v.

VINCENT J. DE RIDAN,
A appellee.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

November 28, 1937, plaintiffs, the payees of a promissory note for \$1,750, made by defendant, caused judgment to be entered on the note for \$2,860, being the face of the note, 1940 interest, and 170 attorney's fees. August 2, 1940, defendant filed his petition praying that the judgment be declared fully satisfied or record or in the alternative that the judgment be vacated and he be given leave to defend. August 22, 1940, an order was entered that the judgment be opened and defendant be given leave to defend, and the petition filed by defendant stand as his affidavit of defense. There was a jury trial, a verdict and judgment in defendant's favor and plaintiff is appeal.

The record discloses that May 26, 1937, plaintiff and defendant became stockholders of the Midwest Radio Specialty Corporation which was engaged in the manufacture of direct electric loudspeakers for radios under a license from the owner of a patent and together with Philip H. Sheridan, defendant's brother, acquired control of the corporation and of the patent. Plaintiff's corporation were elected officers of the corporation and conducted its business, defendant having been elected president. But the business of the company seems to have been principally carried on under the management of plaintiffs. The company owed about \$10,000 and there is evidence to the effect that each of the plaintiffs and defendant agreed to put in \$2,500. It is not clear whether plaintiff filed his

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but it seems to be assumed that they did. There is evidence that defendant did not pay into the company the \$2,500. From these funds about one-half of the debts of the corporation were paid. For the balance the corporation gave its 9 promissory notes which were personally endorsed by defendant. His was the only endorsement the creditors would accept. The notes so endorsed totalled \$4,798.59 and were to become due in October and November of 1927. It seems to be agreed that in the fall of 1927, the corporation owed about \$7,000. Each of the plaintiffs and defendant agreed that it was for the best interest of all to borrow this \$7,000, pay the indebtedness of the company and then sell the assets or liquidate the company. November 27, 1927, defendant executed the note in suit for \$1,750, being his one-fourth of the \$7,000, payable to the order of the three plaintiffs, 1 year after date, with interest at 6% per annum.

Defendant's version of the agreement made by the parties at the time of the execution of the note was that each of the four persons would make a note for \$1,750; that defendant's note was payable to the three plaintiffs and was to be endorsed by them and the four notes were to be put up as collateral for the loan that plaintiffs were to make. The evidence of all parties is that the proceeds of the loan were to be used to pay the indebtedness of the corporation, that then the assets of the corporation, including the patent, would be sold or liquidated for about \$25,000, which the parties expected would take but a short time and when enough was realized from the sale or liquidation, the four notes would be taken up and plaintiffs would return defendant's note to him.

The undisputed evidence is further to the effect that after May, 1927, the corporation did not prosper and did but little business. October 15, 1927, the three plaintiffs executed their promissory note for \$3,071, payable to "Ourselves" and by them endorsed, due one year after date, and November 5, they made another

but it seems to be assumed that they did. There is evidence that defendant did not pay into the company the \$5,000. From these funds about one-half of the debts of the corporation were paid. For the balance the corporation gave the 3 promissory notes which were personally endorsed by defendant. This was the only endorsement the creditors would accept. The notes so endorsed totaled \$17,500 and were to become due in October and November of 1937. It seems to be agreed that in the fall of 1937, the corporation owed about \$7,000. Each of the plaintiffs and defendant agreed that it was for the best interest of all to borrow this \$7,000, pay the indebtedness of the company and then sell the assets or liquidate the company. November 27, 1937, defendant executed the note in suit for \$1,750, being his one-fourth of the \$7,000, payable to the order of the three plaintiffs, 1 year after date, with interest at 6 per annum.

Defendant's version of the agreement made by the parties at the time of the execution of the note was that each of the four persons would make a note for \$1,750; that defendant's note was payable to the three plaintiffs and was to be endorsed by them and the four notes were to be put up as collateral for the loan that plaintiffs were to make. The evidence of all parties is that the proceeds of the loan were to be used to pay the indebtedness of the corporation, that then the assets of the corporation, including the patent, would be sold or liquidated for about \$25,000, which the parties expected would take but a short time and then enough was realized from the sale or liquidation, the four notes would be taken up and plaintiffs would return defendant's note to him.

The undisputed evidence is further to the effect that after May, 1937, the corporation did not prosper and did not little business. October 15, 1937, the three plaintiffs executed their promissory note for \$5,071, payable to "Cashiers" and by them endorsed, due one year after date, and November 3, they made another

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note for \$4,100 payable to the order of P. H. Ferrier, the father of plaintiffs Eugene and C. Rex Ferrier, due one year after date. Both notes bore interest at 6% per annum. August 13, 1930, the father, P. H. Ferrier, caused judgment by confession to be entered in the Municipal court of Chicago on these two notes against plaintiffs.

Plaintiff, Eugene Ferrier, testified that plaintiffs borrowed \$7,000 from the father of the witness giving the two notes above referred to for which the father gave two checks, payable to plaintiff, Walsh, and that the money was used to pay the notes of the corporation and other indebtedness of the corporation. That all the debts of the corporation were paid except a small balance on a note held by the Webster Electric Corporation, of Racine, Wisconsin.

The evidence further tends to show that one of the checks made by P. H. Ferrier for \$3,071, which was given to plaintiff Walsh, was deposited in Walsh's personal account and the check for \$4,100, the balance of the \$7,000 borrowed from the father, was never deposited in the corporation's bank account. The evidence is further to the effect that defendant, who had endorsed the 9 notes of the corporation above mentioned, was sued on one of them and paid the balance due which was between \$400 and \$600.

Defendant put in evidence a balance sheet of the corporation showing that January 1, 1928, the corporation owed \$3,579.91. There is further evidence to the effect that for a number of months prior to that time, the expenses of the corporation were very small since the company had practically ceased to do business and that plaintiffs had paid P. H. Ferrier only about \$2,500 on the more than \$7,000 he had loaned to them, as evidenced by the two notes. There is other evidence in the record which we think it unnecessary to mention here.

There is considerable argument in the briefs filed on behalf of both parties as to whether the note in suit was delivered to plaintiffs conditionally so as not to become a binding obligation.

note for \$4,100 payable to the order of P. H. Ferrier, the father of plaintiff Eugene and H. Rex Ferrier, one year after date. Both notes bore interest at 6% per annum. August 12, 1922, the father, P. H. Ferrier, caused judgment by consent to be entered in the Municipal Court of Chicago on these two notes against plaintiff.

Plaintiff Eugene Ferrier, testified that plaintiff Eugene \$7,000 from the father of the witness giving the two notes above referred to for which the father gave two checks, payable to plaintiff, and that the money was used to pay the notes of the corporation and other indebtedness of the corporation. That all the debts of the corporation were paid except a small balance on a note held by the Webster Electric Corporation, of Chicago, Illinois. The evidence further tends to show that one of the checks made by P. H. Ferrier for \$3,071, which was given to plaintiff, was deposited in a bank account and the check for \$4,100, the balance of the \$7,000 borrowed from the father, was never deposited in the corporation's bank account. The evidence is further to the effect that defendant, who had borrowed the \$7,000 of the corporation above mentioned, was paid on one of them and paid the balance due which was between \$400 and \$500.

Defendant put in evidence a balance sheet of the corporation showing that January 1, 1923, the corporation owed \$3,071.17. There is further evidence to the effect that for a number of months prior to that time, the expenses of the corporation were very small since the company had practically ceased to do business and that plaintiff had paid P. H. Ferrier only about \$2,500 on the two notes. \$7,000 he had loaned to them, as evidenced by the two notes. There is other evidence in the record which we think is unnecessary to mention here.

There is considerable argument in the briefs filed on behalf of both parties as to whether the note is justly enforceable to plaintiff's conditionally so as not to be a naked obligation.

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But we think it unnecessary to discuss the point or the authorities for the reason that all the evidence is to the effect there was a failure, or partial failure, of consideration and since the suit is between the payees and the maker, the question of the consideration may be gone into. [Par. 10, §9, ch. 98, Ill. Rev. Stats. 1941] as may also the question as to the delivery of the note. [Par. 36, §16, ch. 98, Ill. Rev. Stats. 1941.] While it is uncertain from the evidence what plaintiffs did with the \$7,000 they borrowed from P. H. Ferrier, there is evidence from which the jury might properly find, that January 1, 1928, there was \$3,579.91 due and owing by the corporation, and this question was submitted to the jury by an instruction given at plaintiffs' request. That instruction is: "The court instructs the jury if you find from a preponderance of the evidence that the plaintiffs did obtain a loan for the purpose of paying off the debts of the Midwest Radio Specialty Corporation and that such debts were in fact paid off from the proceeds of the loan, that the corporation had no assets to pay off said loan, then in your verdict you will find the issues for the plaintiffs." (And there is evidence tending to show that the corporation had sufficient assets.)

But counsel for plaintiffs contend that the judgment is wrong and should be reversed because the court, on his own motion, instructed the jury that "if you find from the evidence and under the instructions of the court that the corporation had sufficient assets of its own to pay back said loan, then you will find the issues for the defendant." And counsel say, "There is no evidence in the record from which the jury could have reasonably found that the corporation was under any duty to pay the loan made by the plaintiffs." We think this argument is unsound. While the corporation did not directly borrow the \$7,000 from P. H. Ferrier, it is uncontradicted that the money was borrowed for its benefit and by plaintiffs who were officers and running the corporate business. Moreover, the record discloses that when plaintiffs' motion for a new trial came on for hearing and when the

But we think it unnecessary to discuss the point or the authorities for the reason that all the evidence is to the effect that there was a failure, or partial failure, of consideration and since the suit is between the payee and the maker, the question of the consideration may be gone into. [Par. 10, §2, ch. 82, Ill. Rev. Stat., 1941] we may also the question as to the delivery of the note. [Par. 26, §2, ch. 82, Ill. Rev. Stat., 1941.] While it is uncertain from the evidence what plaintiff did with the \$7,000 they borrowed from P. H. Ferrier, there is evidence from which the jury might properly find, that January 1, 1938, there was \$2,873.21 due and owing by the corporation, and this question was submitted to the jury by an instruction given to plaintiff's request. That instruction is: "no court instructs the jury if you find from a preponderance of the evidence that the plaintiff did obtain a loan for the purpose of paying off the debts of the Midwest Radio Specialty Corporation and that such debts were in fact paid off from the proceeds of the loan, that the corporation had no assets to pay off said loan, then in your verdict you will find the issues for the plaintiff." (and there is evidence tending to show that the corporation had sufficient assets.)

But counsel for plaintiff contends that the judgment is wrong and should be reversed because the court, on its own motion, instructed the jury that "if you find from the evidence and under the instructions of the court that the corporation had sufficient assets of its own to pay back said loan, then you will find the issues for the defendant." And counsel says, "There is no evidence in the record from which the jury could have reasonably found that the corporation was under any duty to pay the loan made by the plaintiff." We think this argument is unsound. While the corporation did not directly borrow the \$7,000 from P. H. Ferrier, it is undisputed that the money was borrowed for its benefit and by plaintiff who were officers and running the corporate business. Moreover, the record discloses that when plaintiff's motion for a new trial came on for hearing and that the

question of giving this instruction was being discussed, the court stated that he had specifically asked counsel for both parties whether they had any objection to it. And counsel for plaintiffs replied: "What is the use?" And that he did not comprehend the meaning of the instruction at that time. "I didn't see what was wrong with it," and continuing counsel said: "There are two things fatally wrong with this. First, it does not tell the time. In other words, the only time when the corporation would be called upon to pay that loan was when the loan became due and payable, so then the question is, when did the corporation have sufficient funds to pay that loan? That would have been in November, 1928." And in plaintiffs' reply brief reference is made to Par. 3, Rule 62, of the Municipal court of Chicago. That paragraph is as follows: "Objections to the charge must be made before the jury retire and out of the presence of the jury. They must specifically point out wherein the part objected to is erroneous and the party objecting must indicate clearly the correction therein desired to be made."

The record discloses that when the court inquired of counsel if they had any objection to the instruction which he proposed to give although it was not out of the presence of the jury, yet upon a consideration of what took place we think the rule was substantially complied with and it was the duty of counsel for plaintiffs to then point out any objection they had, and it is not sufficient for counsel, several days after the verdict is rendered to then claim the instruction was wrong.

Plaintiffs further contend that the court erred in admitting the financial statement which purported to show the condition of the corporation as of January 1, 1928, above referred to, because "The original ledger of the company, from which the statement was presumably prepared, was excluded from evidence when offered by plaintiffs, and was not offered in evidence by the defendant." When offering the

question of giving this instruction regarding discovery, the court stated that he had specifically asked counsel for both parties whether they had any objection to it. And counsel for plaintiffs replied: "That is the case." And that he did not comprehend the meaning of the instruction at that time. "I didn't see what was wrong with it," and continuing counsel said: "There are two things fatally wrong with this. First, it does not tell the jury. In other words, the only time when the corporation would be called upon to pay that loan was when the loan became due and payable, so then the question is, when did the corporation have sufficient funds to pay that loan? That would have been in November, 1923." And in plaintiffs' reply brief reference is made to Item 3, Rule 62, of the Municipal Court of Chicago. That paragraph is as follows: "objections to the charge must be made before the jury retires and out of the presence of the jury. They must specifically point out wherein the part objected to is erroneous and the party objecting must indicate clearly the correction therein desired to be made."

The record discloses that when the court informed of counsel if they had any objection to the instruction which he proposed to give although it was not out of the presence of the jury, yet none. Consideration of what took place we think the rule was substantially complied with and it was the duty of counsel for plaintiffs to then point out any objection they had, and it is not sufficient for counsel several days later the verdict is rendered to then claim the instruction was wrong.

Plaintiffs further contend that the court erred in admitting the financial statement which purports to show the condition of the corporation as of January 1, 1923, have referred to, because the original ledger of the company, from which the statement was presumably prepared, was excluded from evidence when offered by plaintiffs, and was not offered in evidence by the defendant." Then offering the

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ledger, counsel for plaintiffs ^{was} examining Eugene S. Ferrier. He testified that when Mr. Walsh ceased to be active in the conduct of the business, the witness took possession of the books of the company and moved them to a safer place. He then identified the ledger and said it was in the same condition it was when he saw it in July, 1928; that a bookkeeper named Thompson, who made the entries, was afterward discharged or laid off; that he could not locate him and on objection that there was no evidence that the book was correct, it was excluded. Afterward defendant offered the financial statement which the evidence tends to show had been in possession of plaintiff Walsh, who had made some pencil marks on it. It was produced on the trial by defendant and offered in evidence. In these circumstances, we think the rule stated in Hochschild v. Goddard Tool Co., 233 Ill. App. 56, is not applicable. In that case an audit had been drawn off the books and was being offered by the party making it, and it was held the books should have been in court so that the witness might be cross-examined, while in the instant case, there was evidence from which the jury might find that the statement was made by plaintiffs. We think the statement was properly received in evidence.

In the reply brief counsel for plaintiffs say: "The main issue is, should the court have granted plaintiffs' motion for a directed verdict in their favor, made when the defendant rested his case and renewed at the close of all the evidence?" The record discloses that plaintiffs introduced the note in evidence and rested. The defendant then put in his evidence at the close of which counsel for plaintiffs moved for a directed verdict and the court stated he reserved his ruling. Thereupon plaintiffs put in their evidence, calling a number of witnesses and introducing a number of documents. When plaintiffs offered this evidence after making their motion for a directed verdict, the motion was out of the case for all time. It was not reserved and could not be reserved but was waived by plaintiffs putting in their evidence. We have many times stated the proper rule and in Popadowski v. Bergaman, 304 Ill. App. 422, spelled the rule out. We there cited a

was
 ledger, counsel for plaintiffs examining witness O. F. Foster. He testified that when Mr. Walsh came to be active in the conduct of the business, the witness took possession of the books of the company and moved them to a safer place. He then identified the ledger and said it was in the same condition it was when he saw it in July, 1928; that a bookkeeper named Thompson, who made the entries, was afterward discharged or laid off; that he could not locate him and on objection that there was no evidence that the book was correct, it was excluded. Afterward defendant offered the financial statement which the evidence tends to show had been in possession of plaintiff Walsh, who had made some pencil marks on it. It was produced on the trial by defendant and offered in evidence. In these circumstances, we think the rule stated in Hochschild v. Goodrich Tool Co., 232 Ill. App. 56, is not applicable. In that case an audit had been done of the books and was being offered by the party making it, and it was held the books should have been in court so that the witness might be cross-examined, while in the instant case, there is evidence from which the jury might find that the statement was made by plaintiff. As this the statement was properly received in evidence.

In the reply brief counsel for plaintiffs say: "The main issue is, should the court have granted plaintiffs' motion for a directed verdict in their favor, made when the defendant rested his case and renewed at the close of all the evidence?" The record discloses that plaintiffs introduced the note in evidence and rested. The defendant then put in his evidence at the close of which counsel for plaintiffs moved for a directed verdict and the court stated he reserved his ruling. Thereupon plaintiffs put in their evidence, calling a number of witnesses and introducing a number of documents. When plaintiffs offered this evidence after making their motion for a directed verdict, the motion was out of the case for all time. It was not renewed and could not be renewed but was waived by plaintiffs putting in their evidence. We have many times stated the proper rule and in Goodrich v. Berkman, 304 Ill. App. 422, spelled the rule out. We there cited

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case from the Supreme court and cases from the Appellate court to which we might add Goldie v. Werner, 151 Ill. 561; Dixon v. Smith-Wallace Shoe Co., 283 Ill. 234; Goldberg v. Capitol Freight Lines, Ltd., 314 Ill. App. 347, affirmed by our Supreme court January 21, 1943, #26803.

From what we have said, we are also of opinion that the court properly denied plaintiffs' motion for a directed verdict at the close of all the evidence.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

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which we might add Goldie v. Smith, 131 Ill. 301; Wright v.
Smith-Wallace Shoe Co., 283 Ill. 324; Wright v. Smith-Wallace
Shoe Co., 135 Ill. App. 347, affirmed by our Supreme Court
January 21, 1942, 448802.
From what we have said, we are also of opinion that the court
properly denied plaintiff's motion for a directed verdict at the
close of all the evidence.
The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

McDonnell, J., and McLaughlin, J., concur.

42318

MICHAEL J. NORTON,
Appellant,

v.

NORMAL PARK PRESBYTERIAN CHURCH,
an Illinois religious corporation,
Appellee.

318 I.A. 233

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

May 29, 1941, plaintiff as assignee of Reverend *Clifford* Littell LeDuc who was pastor of defendant Normal Park Presbyterian Church from September 17, 1928, to October 31, 1940, brought suit against the church. His action consisted of two parts (1) "Separate Action at Law" to recover the claimed balance of Reverend LeDuc's salary remaining unpaid from April 1, 1933, to October 31, 1940, aggregating \$19,276.97, together with interest thereon at 5% per annum on each monthly payment, amounting to about \$5000. And (2) a "Separate Action in Chancery" to compel defendant church to pay more than \$5000 into a pension fund operated by the Board of Pensions of the Presbyterian Church for the benefit of Reverend LeDuc.

In the separate action at law there was a trial and a verdict in defendant's favor; judgment was entered on the verdict. In the chancery phase of the case defendant's motion to dismiss was sustained and plaintiff prosecutes this appeal.

The record discloses that September 17, 1928, a written "Call for a Pastor" was executed "at the request and on behalf of the congregation" of defendant church inviting Rev. LeDuc to become pastor of the church. The invitation was accepted and Rev. LeDuc served as pastor from November 8, 1928, to October 31, 1940. In the written call inviting the Rev. LeDuc to become pastor, the congregation obligated themselves to pay him "\$5,000 yearly in regular monthly payments during the time of your being and continuing the

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ALBERT J. BOWEN,
 Plaintiff,
 v.
 NORMAL PARK PRESBYTERIAN CHURCH,
 an Illinois religious corporation,
 Defendant.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

May 22, 1941, Plaintiff as assignee of defendant Littlefield

who was pastor of defendant Normal Park Presbyterian Church from September 17, 1928, to October 31, 1940, brought suit against the church. His action consisted of two parts: (1) "to recover the balance of unpaid balance of revenues due to the church" to recover the unpaid balance of revenues due to the church remaining unpaid from April 1, 1933, to October 31, 1940, and (2) "to recover the unpaid balance of interest thereon at 5% per annum on \$12,276.97, together with interest thereon at 5% per annum on each monthly payment, amounting to about \$500.00, and (2) a "separate action in Chancery" to compel defendant church to pay to the church \$5000 into a pension fund operated by the church for the benefit of the church. Presbyterian Church for the benefit of the church and its members. In the separate action at law there was a trial and a verdict in defendant's favor; judgment was entered on the verdict. The chancery phase of the case defendant's action to dissolve was sustained and plaintiff's action to dissolve was sustained.

The record discloses that September 17, 1928, a written "call for a pastor" was executed "at the request and on behalf of the congregation" of defendant church inviting Rev. Albert J. Bowen to serve as pastor of the church. The invitation was signed and dated by the congregation as pastor from November 8, 1928, to October 31, 1940. In the written call inviting the Rev. Bowen to become pastor, the congregation obligated themselves to pay him "a salary of \$1,000 yearly in regular monthly payments during the term of year being and continuing the

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regular Pastor of this Church, together with free use of the Manse and one (1) month's vacation each year. And we agree to pay or continue to pay quarterly in advance to the Board of Pensions a sum equivalent to 7 1/2 per cent of said salary." Reverend LeDuc assumed the pastorate of the church and for some time was paid monthly the \$5,000 per year but after a time, due to the depection, of which the court takes judicial notice (Straus v. Chicago T. & Tr. Co., 273 Ill. App. 63; Atchison, T. & St. F. Ry. Co. v. United States, 284 U. S. 248) the monthly payments were not paid in full.

In December, 1932, one of the elders called on the minister and the questions of paying the minister's back salary, and the financial condition of the church on account of the depression were discussed. The elder suggested that the minister's salary should be reduced but nothing was agreed upon at that time. Afterward, in March, 1933, the Board of Elders and the Board of Trustees of the church held a joint meeting, the finances of the church were discussed and it was decided that all the church could pay the minister thereafter was \$2,000 a year in monthly payments and the free use of the Manse, but that the unpaid back salary should all be paid up in full. Shortly afterward, some of the officials of the church called on the minister and told him what had been suggested and he objected to the plan to reduce his salary to \$2,000 a year. The minister was then told that unless the salary was reduced, the church would have to be closed. Shortly thereafter, additional pledges from church members were obtained so that the church would be able to pay the Rev. LeDuc \$2,400 per annum, and thereafter the matter was again taken up with the minister and it was agreed that the church would pay him the amount remaining unpaid on his back salary, or \$2,750, as soon as it was able to do so. The Rev. LeDuc at that time said if they would pay him \$1750 he would donate the remaining \$1,000 due on his back salary to the church.

Shortly thereafter, April 5, 1933, the annual meeting was held and the spiritual and business affairs of the church were discussed.

regular pastor of this church, together with three of the elders
and one (1) month's vacation each year. And as to the way of
continuing to pay quarterly in advance to the board of trustees
a sum equivalent to 7 1/2 per cent of said salary. However, no
amount the pastor of the church and the board have paid
monthly the \$2,000 per year but after a time, due to the depression,
of which the court takes judicial notice (Sprague v. Chicago, 111. Ill. 243
273 111. App. 65; Atchison, T. & P. Co. v. United States 191
U. S. 248) the monthly payments were not paid in full.
In December, 1933, one of the elders called on the minister and
the questions of paying the minister's back salary, and the financial
condition of the church on account of the depression were discussed.
The elder suggested that the minister's salary should be reduced but
nothing was agreed upon at that time. However, in March, 1935, the
Board of Elders and the Board of Trustees of the church held a joint
meeting, the financial condition of the church was discussed and it was decided
that all the church could pay the minister thereafter was \$1,500
a year in monthly payments and the free use of the house, but that the
unpaid back salary should still be paid up in full. Shortly thereafter,
some of the officials of the church called on the minister and he
himself had been suggested and he objected to the plan to reduce
his salary to \$1,500 a year. The minister was then told that unless
the salary was reduced, the church would have to go bankrupt. Thereafter,
thereafter, additional pledges from church members were obtained so that
the church would be able to pay the full amount of \$2,000 per annum, and
thereafter the matter was again taken up with the minister and it
was agreed that the church would pay him the amount previously unpaid
on his back salary, or \$2,750, as soon as it was able to do so. The
Rev. stated at that time and it is now said that he would pay him \$1,750 per annum
during the remaining \$1,000 due on his back salary to the church.
Shortly thereafter, April 6, 1935, the annual meeting was held
and the spiritual and business affairs of the church were discussed.

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Rev. LeDuc presided during part of this meeting. There is some dispute as to the character of the two parts of the meeting but it is undisputed that at that time, an itemized budget was read showing the minister's salary at \$2,400, which was approved by a vote and at the conclusion of the meeting, Rev. LeDuc stated that he was willing to accept the reduction in salary because of the economic conditions prevailing. The minutes of the meeting prepared by the clerk of the congregation are in the record, which show that the chairman stated "at a joint meeting of Elders and Trustees at which thirteen were present," that it was unanimously believed the total from pledges and collections for the year would be \$7,500. Then follows an itemization of expenditures and expenses and the minutes continued: "The budget as finally decided upon for the current year at the abovementioned and a subsequent meeting is as follows:" The items are then set forth, including the minister's salary of \$2,400, making a total of \$7,497. The minutes continued: "Mr. LeDuc, our minister then commented on the reduction of his salary and stated his willingness to accept such reduction on account of the national economic condition prevailing."

From the time of this meeting, April, 1933 to April, 1936, the minister was paid \$200 monthly by check. The cancelled checks which are in the record bear the following endorsement: "Endorsement of this check acknowledges receipt in full for salary for April, 1933, \$200, C. L. LeDuc, (endorsement of payee)." The \$1,750 which was the amount of the back salary due Rev. LeDuc, as above stated, was paid as follows: September 15, 1933, \$150; October 13, 1933, \$100; March 31, 1934, \$100; December 6, 1934, \$500; and July 10, 1935, \$900. Each of these checks bears an endorsement similar to the one above quoted, except that the payments are for "back salary" and the last check of \$900 bears "Endorsement of this check acknowledges receipt in full for back salary in full, \$900."

At the annual meetings of the congregation of defendant church held April, 1934 and 1935, budgets were read and approved which are

Rev. LaDue presided during part of this meeting. There is also

dispute as to the character of the two parts of the meeting and it is undisputed that at that time, an identical budget was not shown the minister's salary at \$2,400, which was approved by a vote and at the conclusion of the meeting, Rev. LaDue stated that he was willing to accept the reduction in salary because of the economic conditions prevailing. The minutes of the meeting prepared by the clerk of the congregation are in the record, which show that the chairman stated "at a joint meeting of Elders and Trustees at which Elders were present," that it was unanimously believed the total from pledges

and collections for the year would be \$1,500. Then follows an itemization of expenditures and expenses and the minutes continued:

"The budget as finally decided upon for the current year at the

above-mentioned and a subsequent meeting is as follows: "The items are

then set forth, including the minister's salary of \$2,400, which

a total of \$7,437. The minutes continued: "and, indeed, our minister

then commented on the reduction of his salary and stated his willingness

to accept such reduction on account of the national economic conditions

prevailing."

From the time of this meeting, April, 1933 to April, 1938, the

minister was paid \$200 monthly by check. The cancelled checks were

are in the record bear the following endorsement: "Indorsement of

this check acknowledges receipt in full for salary for April, 1933,

\$200, G. L. LaDue, (endorsement of payee)." The \$1,500 which was paid

amount of the back salary for Rev. LaDue, as above stated, was paid

as follows: September 15, 1933, \$150; October 15, 1933, \$100; March

31, 1934, \$100; December 6, 1934, \$500; and July 10, 1935, \$200.

Each of these checks bears an endorsement similar to the one above

quoted, except that the payee is for "back salary" and the last

check of \$500 bears "Indorsement of this check acknowledges receipt in

full for back salary in full, \$500."

At the annual meetings of the congregation of subsequent years

held April, 1934 and 1935, budgets were read and approved which are

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shown by the minutes in the record, in each of which the minister's salary is given at \$2,400 per year. The evidence further shows that February, 1934, and 1935, the Board of Trustees sent a communication by mail to the members of the church prepared by Mr. McDonald, who had been a member of the church for about 20 years. He had been a member of the Board of Elders and later was elected a member of the Board of Trustees, was elected vice president of the Board, and the president being an elderly man, most of the duties devolved upon the vice president. He testified that the financial statement of February, 1934, was the first of the kind that had been sent to the members; there was considerable discussion between himself and Rev. LeDuc about the statement, and the witness testified: " We agreed that such a statement would be of help in interesting the members in the canvass and would give them information that they were entitled to know, " I prepared that statement with Mr. LeDuc prior to its being mailed to the members of the church. I outlined my idea of what the statement should be, and he made certain corrections, and between us we arrived at the statement that was sent out. *** the wording of the statement was prepared by Mr. LeDuc and myself." Each of the two statements is entitled "How Our Church Stands Financially." Then follow items showing the current outstanding obligations as of March 31, 1933, and as of February 1, 1934, showing the decrease in unpaid pledges, and continuing, "3. During the present fiscal year, all salaries have been paid in full and on time." The statement of February, 1935, is substantially the same except in the differences of the obligations, etc. It also says, "all salaries have been paid in full and on time."

As above stated, the balance of the \$1,750 due Rev. LeDuc for back salary, \$900, was paid to him July 10, 1935, July 19, 1935, the Rev. LeDuc sent a letter addressed to Mr. McDonald, vice president of the Board of Trustees of the church, in which he acknowledged receipt of the check for \$900 and closed the letter by saying, "I am

shown by the minutes in the record, in each of which the minister's salary is given at \$1,400 per year. The evidence further shows that February, 1934, and 1935, the Board of Trustees sent a communication by mail to the members of the church prepared by Mr. Leino, who had been a member of the church for about 20 years. He had been a member of the Board of Trustees and later was elected a member of the Board of Trustees, was elected vice president of the Board, and the president being an elderly man, most of the duties devolved upon the vice president. He testified that the financial statement of February, 1934, was the first of the kind that had been sent to the members; there was considerable discussion between himself and Rev. Leino about the statement, and the witness testified: "I agreed that such a statement would be of help in interesting the people in the canvass and would give them information that they were entitled to know."

"I prepared that statement with Mr. Leino prior to its being mailed to the members of the church. I outlined my idea of what the statement should be, and he made certain corrections, and before we arrived at the statement that was sent out, the wording of the statement was prepared by Mr. Leino and myself." Each of the two statements is entitled "How Our Church Stands Financially." They follow items showing the current outstanding obligations as of March 31, 1933, and as of February 1, 1934, showing the decrease in liabilities, and continuing, "3. During the past fiscal year, all salaries have been paid in full and on time." The statement of February, 1935, is substantially the same except in the list of the obligations, etc. It also says, "All salaries have been paid in full and on time."

As above stated, the balance of the \$1,750 Rev. Leino for back salary, \$600, was paid to him July 10, 1935, July 12, 1935, the Rev. Leino sent a letter addressed to Mr. Leino, vice president of the Board of Trustees of the church, in which he acknowledged receipt of the check for \$600 and closed the letter by saying, "I am

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sure we are all glad that the minister's back pay is now paid up in full."

Mr. McDonald further testified that before the annual meeting of 1936, the church finances were improving and he stated to Rev. LeDuc that his salary could be increased \$100 a year. This was agreed upon and thereafter Rev. LeDuc was paid by check in monthly payments of \$208.33, and from that time until the check of March 30, 1940, they were endorsed by Rev. LeDuc, most of them bearing the following endorsement: "Endorsement of this check acknowledges receipt in full for salary to March 31, 1940, \$208.33." The monthly checks beginning May 1, 1940, for \$208.33, and subsequent months including October, 1940, were endorsed by Rev. LeDuc "On Account."

Rev. LeDuc testified that at the meeting in April, 1933, when it was proposed to make his salary \$2,400 per year he stated: "I will never change my contract so long as I am the minister of this church." I said 'I will take a cut, gladly, to go along in the depression, but I will never change the contract, for the ministers know the strength of a contract; it is just like a contract, any other contract.'" He further testified that in discussing the financial affairs of the church he prepared the financial statements above mentioned; that prior to that time he had spoken about the finances and he had been "called down by the Board of Trustees - that was after 1935," and that afterwards he did not mention finances.

The evidence further shows that at the annual meetings of 1936 to 1940, budgets were read and approved and state the minister's salary as \$2,500. During these 5 years, annual statements prepared by Mr. McDonald and Rev. LeDuc were mailed to the church members in each of which it was stated that all salaries had been paid in full.

The church published and distributed a magazine which was prepared by Rev. LeDuc. In the February number, 1938, after giving the time of the regular church services and the activities of the church, etc., the following appeared: "What About Our Church Finances?"

1. Very Good News--Pledges are better paid; all our bills are paid;

sure we are all glad that the minister's back pay is now paid up in

full."

Mr. McDonald further testified that before the annual meeting

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of which it was stated that all salaries had been paid in full.

The church published and distributed a magazine which was

prepared by Rev. Ledue. In the February number, 1936, after giving

the time of the regular church services and the activities of the church,

etc., the following appeared: "What About Our Church Finances?"

I. Very Good News--Bledges are better paid; all our bills are paid;

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all salaries are paid on time and in full; we have no notes to be met; and our sole outstanding obligation is the mortgage on the manse; and we have some surplus in our church bank account." In the April, 1940 number of the church magazine, in speaking of the Annual Meeting of the church the following appears: "The treasurer's report showed that we closed the fiscal year with all bills paid and a balance in the treasury of \$846.97."

The evidence further shows that at the annual meeting held April 17, 1940, Rev. LeDuc stated he was not satisfied with the amount of his current salary and asked for an increase. The minutes of that meeting show that Rev. LeDuc went into the matter of his salary during the years he had served as minister of the church, pointing out the drastic reduction that had been made shortly after the depression, calling attention to the fact that only \$100 of the reduction had been restored and that he was not agreeing to accept \$2,500 per year as was set up in the proposed budget. But the vote taken at that time approved the budget by a vote of 84 to 29. This budget carried the annual salary of the minister at \$2,500. Following this meeting, and on May 2, 1940, Rev. LeDuc wrote a letter on the Normal Park Presbyterian Church stationery, addressed "To the attention of the Executive Council's special Committee of Presbytery" in which he brought to the attention of the Presbytery the annual congregational meeting of the Normal Park Presbyterian Church held April, 17, 1940, and at that time he told the congregation "That I no longer agreed to a 50% cut in my contractual Salary of \$5000 a year- beginning with April 1, 1940," and ~~that~~ having read the law of the church to the congregation, he told them he would appeal to the Presbytery "to adjudicate this matter of my salary, asking for a fairer proportion of the local financial income."

November 1, 1940, Rev. LeDuc assigned all of his claim against the defendant church to Michael J. Norton, plaintiff, "In consideration of the sum of Ten Dollars (\$10.00) and other good and valuable considerations." And there is evidence that the \$10 was paid, the

all salaries are paid on time and in full; we have no notes to be paid; and our sole outstanding obligation is the mortgage on the manse; and we have some surplus in our church bank account." In the April, 1940 number of the church magazine, in speaking of the annual meeting of the church the following appears: "The treasurer's report showed that we closed the fiscal year with all bills paid and a balance in the treasury of \$46.97."

The evidence further shows that at the annual meeting held April 17, 1940, Rev. LeDuc stated he was not satisfied with the amount of his current salary and asked for an increase. The minutes of that meeting show that Rev. LeDuc went into the matter of his salary during the years he had served as minister of the church, pointing out the drastic reduction that had been made shortly after the depression, calling attention to the fact that only \$100 of the reduction had been restored and that he was not agreeing to accept \$2,500 per year as was set up in the proposed budget. But the vote taken at that time approved the budget by a vote of 24 to 29. This budget carried the annual salary of the minister at \$2,500. Following this meeting, and on May 2, 1940, Rev. LeDuc wrote a letter on the formal North Presbyterian Church stationery, addressed "To the attention of the Executive Council's Special Committee of Presbytery" in which he brought to the attention of the Presbytery the annual congregational meeting of the formal Park Presbyterian Church held April 17, 1940, and at that time he told the congregation "that I no longer agreed to a 60% cut in my contractual salary of \$3000 a year - beginning with April 1, 1940," and that having read the law of the church to the congregation, he told them he would appeal to the Presbytery "to adjudge this matter of my salary, asking for a fairer proportion of the local financial income."

November 1, 1940, Rev. LeDuc assigned all of his clerical duties to the defendant church to Richard J. Norton, Plaintiff, "in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable considerations." And there is evidence that the \$10 was paid, the

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details being carried out by counsel for Norton and counsel for Rev. LeDuc. Plaintiff and the Rev. LeDuc had never met until plaintiff was subpoenaed by defendant as a witness and appeared in court.

Counsel for plaintiff submitted to the court 61 instructions and 6 interrogatories, of which the court gave 20 instructions and 5 interrogatories. Defendant requested 21 instructions, of which the court gave 13 and refused 8. Plaintiff's request for so many instructions placed a great burden on the court and if given would only tend to confuse the jury.

The Constitution of the Presbyterian Church during the period from 1928 to 1936, contained the following provision: "No change shall be made in the amount of the salary stipulated in the call without the consent of Presbytery, unless both minister and congregation agree thereto; and only the congregation, regularly assembled, shall have power to bring such a question to the attention of the presbytery." In May, 1936, this provision of the Constitution was changed so as to read: "No change shall be made in any of the provisions of the call without the consent of the Presbytery. Either the minister, or the congregation in meeting regularly assembled, shall have power to bring such a question to the attention of Presbytery."

Counsel for plaintiff contends that the written "Call for a Pastor" of September 17, 1928, which was accepted by Rev. LeDuc, constituted a valid and binding contract; that the salary was there fixed at \$5,000 per annum, payable in regular monthly installments and under the Constitution of the Presbyterian Church, the salary "could not be altered or changed except by a formal action of the congregation of the Normal Park Presbyterian Church and the approval of the Presbytery of Chicago." We think this contention cannot be sustained for the reason that the provision of the Constitution of the church in force in April, 1933, when defendant claims the salary was reduced by agreement, provided that no change could be made in the

details being carried out by counsel for Norton and counsel for Rev. LeDuc. Plaintiff and the Rev. LeDuc had never met until plaintiff was subpoenaed by defendant as a witness and appeared in court.

Counsel for plaintiff submitted to the court 31 instructions and 8 interrogatories, of which the court gave 30 instructions and 5 interrogatories. Defendant requested 31 instructions, of which the court gave 13 and refused 8. Plaintiff's request for 30 instructions placed a great burden on the court and it given would only tend to confuse the jury.

The Constitution of the Presbyterian Church during the period from 1928 to 1936, contained the following provision: "no change shall be made in the amount of the salary stipulated in the call without the consent of Presbytery, unless both minister and congregation agree thereto; and only the congregation, regularly assembled, shall have power to bring such a question to the attention of the presbytery." In May, 1936, this provision of the Constitution was changed so as to read: "no change shall be made in any of the provisions of the call without the consent of the presbytery. If the minister, or the congregation in meeting regularly assembled, shall have power to bring such a question to the attention of Presbytery."

Counsel for plaintiff contends that the written "call for a Pastor" of September 14, 1928, which was accepted by Rev. LeDuc, constituted a valid and binding contract; that the salary was then fixed at \$5,000 per annum, payable in regular monthly installments and under the Constitution of the Presbyterian Church, the salary "could not be altered or changed except by a formal action of the congregation of the Normal Park Presbyterian Church and the approval of the Presbytery of Chicago." He thinks this contention cannot be sustained for the reason that the provision of the Constitution of the church in force in April, 1933, when defendant claims the salary was reduced by agreement, provided that no change could be made in the

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amount of the salary stipulated in the call, without the consent of the Presbytery "unless both minister and congregation agree thereto" and we think the overwhelming weight of the evidence is to the effect that the congregation and the minister agreed to such a reduction and the jury so found in answering one of the special interrogatories given at plaintiff's request. That interrogatory is: "Did the congregation of the Normal Park Presbyterian Church ever make, approve, or authorize any change in the salary of the Reverend Clifford L. LeDuc provided in the 'Call for a Pastor' dated September 17, 1928, or any other agreement as to his salary, except the 'Call for a Pastor' dated September 17, 1928?" The jury answered "Yes". So we think it appears that on the trial counsel for plaintiff took the position that the salary of the minister could be reduced by agreement of the minister and the congregation, and counsel assumed there was evidence on this question otherwise he would not have submitted this special interrogatory.

Complaint is also made of the court's ruling on the admission and exclusion of evidence and the giving and refusing of instructions. We have considered the points made and the argument in support of them, but, upon a consideration of the entire record, we are clearly of opinion that there was no error committed which would warrant us in reversing the judgment.

The evidence shows that at and prior to the April meeting of 1933, the financial condition of the church was such that Rev. LeDuc as a practical matter could not continue as pastor unless he agreed to take less salary. He agreed to do so and was continued as pastor. This was sufficient consideration, if any were necessary, to make the agreement for the reduction binding. And since Rev. LeDuc accepted the reduced salary for many months without objection, he will not now be heard to complain that he was entitled to more than he received.

Warner v. Pacific Coast Gas. Co. of San Francisco, 198 Ill. App. 183;

Levy v. Greenberg, 261 Ill. App. 541; Snow v. Griesheimer, 220 Ill.

amount of the salary stipulated in the call, without the consent of the presbytery "unless both minister and congregation agree thereto" and we think the overwhelming weight of the evidence is to the effect that the congregation and the minister agreed to such a reduction and the jury so found in answering one of the special interrogatories given at plaintiff's request. That interrogatory is: "Did the congregation of the Normal Park Presbyterian Church ever make, approve, or authorize any change in the salary of the Reverend Clifford L. Leach provided in the 'Call for a Pastor' dated September 17, 1928, or any other agreement as to his salary, except the 'Call for a Pastor' dated September 17, 1928?" The jury answered "Yes." So we think it appears that on the trial counsel for plaintiff took the position that the salary of the minister could be reduced by agreement of the minister and the congregation, and counsel agree there was evidence on this question otherwise he would not have submitted this special interrogatory.

Complaint is also made of the court's ruling on the admission and exclusion of evidence and the giving and withholding of instructions. We have considered the points made and the argument in support of them, but, upon a consideration of the entire record, we are clearly of opinion that there was no error committed which would warrant us in reversing the judgment.

The evidence shows that at and prior to the April meeting of 1928, the financial condition of the church was such that Rev. Leach as a practical matter could not continue as pastor unless he agreed to take less salary. He agreed to do so and was continued as pastor. This was sufficient consideration, if any were necessary, to make the agreement for the reduction binding. And since Rev. Leach accepted the reduced salary for many months without objection, he will not now be heard to complain that he was entitled to more than he received.

Levy v. Westport, 251 Ill. App. 3d; New v. Westport, 250 Ill. App. 3d; v. Pacific Coast Co., Co. of San Francisco, 128 Ill. App. 125;

Upon a careful consideration of all the evidence in the record we have reached the conclusion that no verdict could stand except one for defendant.

As to the "Separate Action in Chancery," by which it is sought to compel defendant church to pay more than \$5,000 into the pension fund,

Eight days after judgment was entered on the verdict, the court, on February 27, 1942, entered an order sustaining defendant's motion to strike and dismissed the separate "Action in Chancery," for want of equity. Counsel for plaintiff says that "The gist of the chancery action is that the defendant church refused to make the pension payments set forth in the 'Call for a Pastor' dated September 17, 1928. The plaintiff seeks a specific performance of this promise in equity because the payments must be made, not to the plaintiff or the minister, but to a third party, to-wit, the Board of Pensions of the Presbyterian Church, a Pennsylvania corporation." And continuing counsel says: "It is perhaps important to notice that none of the evidence offered by the defendant in the trial of the separate action at law is sufficient to constitute a defense to the separate action in chancery. Whatever may have been the result of adopting budgets at the corporation meetings, nothing is shown in the minutes of these meetings which would constitute a waiver, or release, or a termination or change in the requirement that the defendant make the pension plan payments as set forth in the contract." We think this latter statement is not borne out by the record.

At the annual meeting of the congregation held April 5, 1933, at which the Rev. LeDuc was present and participated, the following appears: "Accumulating pension funds discussed, treasurer reports the matter was taken up with the Board and they informed us that the minister had not joined the pension fund, and he informed us that he did not care to belong to it; therefore, we were able to call off our previous indebtedness of \$1,123.41." In the complaint it was alleged that shortly after September 17, 1928, the Rev. LeDuc became a member of the "Service Pension Plan" and signed an agreement to

Upon a careful consideration of all the evidence in the record we have reached the conclusion that no verdict could stand except one for defendant.

As to the "separate Action in Chancery," by which it is sought to compel defendant church to pay more than \$5,000 into the pension fund,

Eight days after judgment was entered on the verdict, the court, on February 27, 1942, entered an order sustaining defendant's motion to strike and dismissed the separate "Action in Chancery," for want of equity. Counsel for plaintiff says that "the gist of the chancery action is that the defendant church refused to make the pension payments set forth in the 'Call for a Pastor' dated September 17, 1938. The plaintiff asks a specific performance of this promise in equity because the payments must be made, not to the plaintiff or the minister, but to a third party, to-wit, the Board of Pensions of the Presbyterian Church, a Pennsylvania corporation." And continuing counsel says: "It is perhaps important to notice that none of the evidence offered by the defendant in the trial of the separate action at law is sufficient to constitute a defense to the separate action in chancery. Whatever may have been the result of adopting budgets at the corporation meetings, nothing is shown in the minutes of those meetings which would constitute a waiver, or release, or a termination or change in the requirement that the defendant make the pension plan payments set forth in the contract." We think this latter statement is not borne out by the record.

At the annual meeting of the congregation held April 5, 1938, at which the Rev. LeDue was present and participated, the following appears: "Accumulating Pension Funds discussed, treasurer reports the matter was taken up with the Board and they informed us that the minister had not joined the pension fund, and he informed us that he did not care to belong to it; therefore, we were able to call off our previous indebtedness of \$123.41." In the complaint it was alleged that shortly after September 17, 1938, the Rev. LeDue became a member of the "Service Pension Plan" and signed an agreement to

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participate in the plan. That the defendant church likewise became a member of the pension plan as evidenced in the "Call for a Pastor" where it agreed to pay an amount equal to $7\frac{1}{2}\%$ of the annual salary of the pastor, but the church failed and refused to make such payment and by reason of the church's failure, the Rev. LeDuc failed and refused to pay $2\frac{1}{2}\%$ of his yearly salary into the pension fund, as he was required to do, and it was further alleged that the Rev. LeDuc "however, offered to pay said $2\frac{1}{2}\%$ of said actual yearly salary forthwith upon the payment of said $7\frac{1}{2}\%$ thereof by said Normal Park Presbyterian Church to said Board of Pensions pursuant to said Service Pension Plan." From this it appeared that the church and the Rev. LeDuc paid nothing into the pension fund and it is clear that this matter was abandoned by both parties. In these circumstances we think the court correctly dismissed the "Separate Action in Chancery."

The judgment of the Circuit court of Cook county and the order appealed from are affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

participate in the plan. That the defendant church did not
 a member of the pension plan as evidenced in the "Bill for a pastor"
 where it agreed to pay an amount equal to $7\frac{1}{4}\%$ of the annual
 salary of the pastor, but the church failed and refused to make such
 payment and by reason of the church's failure, the Rev. LeDuc failed
 and refused to pay $2\frac{1}{2}\%$ of his yearly salary into the pension fund,
 as he was required to do, and it was further alleged that the Rev.
 LeDuc "however, offered to pay said $2\frac{1}{2}\%$ of said annual yearly salary
 forthwith upon the payment of said $7\frac{1}{4}\%$ thereof by said church to said
 Presbyterian Church to said Board of Pension Payment to said
 Service Pension Plan." From this it appeared that the church and the
 Rev. LeDuc paid nothing into the pension fund and it is clearly that
 this matter was abandoned by both parties. In these circumstances
 we think the court correctly affirmed the "separate action in equity."
 The judgment of the Circuit Court of Cook County and the order
 appealed from are affirmed.

RECORDED.

WATSON, P. J., and CONNELLY, J., concur.

42343

PETER BASS and EDWARD P. BROWN,
Appellants,

v.

STANLEY WAWRZONEK and JADWIGA
WAWRZONEK, ALBERT KOLODZIES
and WIKTORIA KOLODZIES,
Appellees.

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

318 I.A. 233²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

March 25, 1940, plaintiffs filed their complaint in chancery alleging that about April, 1938, plaintiffs and Stanley Wawrzonek, who will hereinafter be referred to as defendant, entered into an agreement to purchase a certain piece of real estate on Lawrence avenue, Chicago, and when it was afterward sold, plaintiffs and defendant would divide the profits equally; that the property was so purchased and afterwards defendant conveyed it in exchange for another piece of property located on Keeler avenue, Chicago. The prayer was for an accounting and in the meantime that a receiver be appointed for the Keeler avenue property. Defendant answered denying that in the purchase of the Lawrence avenue property he and plaintiffs had agreed to share the profits. After the case was at issue, it was referred to a master in chancery to take proofs and make up his report. The master took the evidence, made up his report and recommended that the bill be dismissed for want of equity at plaintiffs' costs and they prosecute this appeal.

The record discloses that Edward Brown, plaintiff, was a naturalized American citizen, having come to this country from Poland, as did plaintiff, Peter Bass and the defendant. In 1938 Brown was in the real estate business in Chicago and he and defendant had been friends for many years. Brown testified that about March, 1938, defendant dropped into his real estate office and said he had about

PETER BASS and EDWARD P. BROWN,
Appellants,

v.

STANLEY WARZONER and JADWIGA
WARZONER, ALBERT KOLOBIEZ
and VIKTORIA KOLOBIEZ,
Appellees.

UNITED STATES COURT,
SOUTHERN DISTRICT OF NEW YORK.

313 IL 288

U. S. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

March 25, 1940, plaintiffs filed their petition in bankruptcy alleging that about April, 1938, plaintiffs and Stanley Warzoner, who will hereinafter be referred to as defendant, entered into an agreement to purchase a certain piece of real estate on Lawrence avenue, Chicago, and when it was afterwards sold, plaintiffs and defendant would divide the profits equally; that the property was purchased and afterwards given and conveyed to defendant for another piece of property located on Keeler avenue, Chicago. The report was for an accounting and in the meantime that a receiver be appointed for the Keeler avenue property. When not answered denying that in the purchase of the Lawrence avenue property he and plaintiffs had agreed to share the profits. After the case was at issue, it was referred to a master in chancery to take proofs and make up a report. The master took the evidence, made up his report and recommended that the bill be dismissed for want of equity at plaintiffs' costs and they prosecute this appeal.

The record discloses that Edward Brown, plaintiff, was a naturalized American citizen, having come to this country from Poland, as did plaintiff, Peter Bass and the defendant. In 1938 Brown was in the real estate business in Chicago and he and defendant had been friends for many years. Brown testified that about March, 1938, defendant dropped into his real estate office and said he had about

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\$3,000 he would like to invest in real estate if he could get a bargain; that Bass replied: "the only way I do business on bargains is to take one-half interest in the profits of the sale of buildings, as I have a man now that does the same thing with me." That afterward they looked around at several pieces of property and some days later plaintiff, Peter Bass, who was a licensed real estate broker, came into Brown's office inquiring about securing a mortgage on a certain piece of property which he had for sale. That defendant was in Brown's office at the time and said to Bass "why don't you let us have the building?" and that Bass replied the only way he would go in on such a deal and sacrifice his commission was to get one-third interest in the building proposed to be bought. That this arrangement was agreed upon and afterward the Lawrence avenue property was bought.

Defendant's version was that he and Brown had been good friends for a number of years; that Brown insured some property for defendant; that April 8 or 9, 1938 he met Brown in another man's office. Brown said: "Hello Stanley, I have building bargain." That they talked the matter over and then took plaintiff, Peter Bass, along with them to see the Lawrence avenue property. The evidence is further to the effect that the property had been listed for sale for \$14,000 with Draper & Kramer a real estate firm. That after some time and after they had looked at a number of pieces of property, defendant was advised by Brown that the property could be purchased for \$9,000. That defendant said he thought this was too much and that Brown said he and Bass would allow defendant \$200 from their commissions so that defendant could purchase the property for \$8,800.

April 8, 1938, defendant entered into a written contract to purchase the property from the owner, the American National Bank and Trust Company, as trustee, for \$9,000. The contract recites that \$400 was paid in cash and a mortgage for the balance given for \$8,600. May 2, 1938, the title was conveyed by the bank, as trustee, to Raymond P. Brown, a son of plaintiff, Brown, and on the same date, Raymond P. Brown executed a mortgage for \$6,000 on the property to

Raymond P. Brown executed a mortgage for \$8,000 on the property to Raymond P. Brown, a son of plaintiff, Brown, and on the same date, May 2, 1938, the title was conveyed by the bank, as trustee, to Trust Company, as trustee, for \$9,000. The contract recited that \$400 was paid in cash and a mortgage for the balance, given for \$8,600. Plaintiff purchased the property from the bank, the American National Bank, and on April 8, 1938, defendant entered into a written contract to purchase the property for \$8,600. That defendant could purchase the property for \$8,600, he and Baas would allow defendant \$200 from their commissions so that defendant said he thought this was too much and that Brown said they had looked at a number of pieces of property, defendant was advised by Brown that the property could be purchased for \$8,000. That after some time and after effect that the property had been listed for sale for \$14,000 with to see the Lawrence Avenue property. The evidence is further to the matter over and then took plaintiff, Peter Baas, along with them said: "Well, Stanley, I have building bargain." That they talked the that April 8 or 9, 1938 he met Brown in another man's office. Brown for a number of years; that Brown insured some property for defendant; Defendant's version was that he and Brown had been good friends agreed upon and afterward the Lawrence Avenue property was bought. in the building proposed to be bought. That this arrangement was such a deal and sacrifice his commission was to get one-third interest building?" and that Baas replied the only way he would go in on office at the time and said to Baas "Why don't you let us have the of property which he had for sale. That defendant was in Brown's Brown's office inquiring about securing a mortgage on a certain piece plaintiff, Peter Baas, who was a licensed real estate broker, came into they looked around at several pieces of property and some days later as I have a man now that does the same thing with me." That after it is to take one-half interest in the profits of the sale of buildings; Baas replied: "The only way I do business on buildings; \$3,000 he would like to invest in real estate if he could get

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the Western Federal Savings and Loan Association, of Chicago.

There appears in the record a document in the form of a letter signed by defendant, to the American National Bank, which purports to authorize it to convey the title to Raymond P. Brown. Shortly after the property was transferred to Brown, defendant testified that his wife complained to him that he did not have title to the property but that it was in Raymond Brown. Thereupon defendant complained to plaintiffs and there is some slight contention that he threatened to go to the State's Attorney because the title to the property had not been conveyed to him.

May 17, 1938, Raymond P. Brown conveyed the property by quit claim deed to defendant. Plaintiffs offered in evidence a document dated May 16, 1938, which is entitled an "Agreement" between defendant, Stanley Wawrzonek, Raymond P. Brown and Peter Bass, which recites that Stanley had purchased the Lawrence avenue property for which he had advanced \$2,675, and that Raymond Brown had secured a first mortgage for \$6,000, and it was agreed "that all monies advanced by each parties is to be deducted from the sale price and refunded to the parties such sums as they advanced and the balance to be divided 1/3 equal share and profit after all costs and expenses are fully paid." This purports to be signed by plaintiffs Edward W. Brown, Peter Bass, and defendant, Stanley Wawrzonek, and on a line below these three names appears what purports to be the signature of Raymond P. Brown.

The evidence further shows that Stanley paid the \$400 earnest money when the deal was closed, making a total he had paid of \$3,000, and the balance of \$6,000 was secured by a mortgage signed by Raymond P. Brown. After the transfer of the property in May, 1938, Stanley took charge of it and apparently collected the rents and paid the running expenses.

April 11, 1939, the property was exchanged by Stanley and wife conveying the property to Anna Chrobak and her husband by warranty deed, and the latter two the same day, conveyed the property they

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May 17, 1938, Raymond P. Brown conveyed the property by deed to defendant. Plaintiffs offered in evidence a document dated May 16, 1938, which is entitled an "agreement" between defendant Stanley Wawronsek, Raymond P. Brown and Peter Bass, which recites that Stanley had purchased the Lawrence Avenue property for which he had advanced \$2,075, and that Raymond Brown had secured a first mortgage for \$6,000, and it was agreed "that all monies advanced by each party is to be deducted from the sale price and returned to the parties such sums as they advanced and the balance to be divided 1/3 equal share and profit after all costs and expenses are fully paid." This purports to be signed by plaintiffs and defendant, Peter Bass, and defendant, Stanley Wawronsek, and on a line below these names appears what purports to be the signature of Raymond P. Brown. The evidence further shows that Stanley paid the \$6,000 money when the deal was closed, making a total he had paid of \$8,000, and the balance of \$6,000 was secured by a mortgage signed by Raymond P. Brown. After the transfer of the property in May, 1938, Stanley took charge of it and apparently collected the rents and paid the running expenses. April 11, 1939, the property was exchanged by Stanley and wife conveying the property to Anna Chrobot and her husband by warranty deed, and the latter two the same day, conveyed the property may

owned to Stanley and his wife. Apparently from that time on, Stanley took charge and managed the Keeler avenue property and the Chrobaks, the Lawrence avenue property. Nothing further appears until June 6, 1939, when plaintiff, Bass, filed an affidavit in the Recorder's Office of Cook county, in which he swore that he and Stanley and Raymond Brown entered into an agreement May 16, 1938, by which Stanley held title to the Lawrence avenue property. That the title was held in trust for the benefit of all the parties and that the agreement between them was that if the property was sold "then from the proceeds of said sale, each party to the said agreement was to be reimbursed with the amount of money each contributed toward the purchase price and the excess over the above original purchase price was to be divided one third equal share to the each party of the said agreement after all costs and expenses are fully paid." The affidavit further set up that Stanley had sold and conveyed the Lawrence avenue property for the Keeler avenue property; that Stanley had not made an accounting or distribution of any moneys "to Peter Bass to which he was entitled under the terms of said agreement and that this affiant states that he has a right, title and interest in the property described, to-wit:" (describing the Keeler avenue property.) That the affidavit is filed for the purpose of notifying all persons of the interest Bass had in the Keeler avenue property.

More than 6 months thereafter, viz., January 10, 1940, Stanley and his wife conveyed the Keeler avenue property by warranty deed to defendant, Kolodzies and wife, in exchange for property conveyed by the Kolodzies at 2424 So. Troy avenue to Stanley and wife. March 25, 1940, following, the complaint in the instant case was filed.

There is further evidence to the effect that shortly after the deal to purchase the Lawrence avenue property was agreed upon, each plaintiff agreed to give Stanley \$100, being a part of their broker's commissions, so that the purchase price to Stanley would be \$8,800. Plaintiffs take a different view of this evidence and say this was a part of the purchase money which they paid in accordance with the

owned to Stanley and his wife. Apparently from that time on, Stanley took charge and managed the Keeler Avenue property and the Grubbs, the Lawrence Avenue property. Nothing further appears until June 6, 1933, when plaintiff, Bass, filed an affidavit in the Recorder's Office of Cook County, in which he swore that he and Stanley and Raymond Brown entered into an agreement May 18, 1933, by which Stanley held title to the Lawrence Avenue property. That the title was held in trust for the benefit of all the parties and that the agreement between them was that if the property was sold "then from the proceeds of said sale, each party to the said agreement was to be reimbursed with the amount of money each contributed toward the purchase price and the excess over the above original purchase price was to be divided one third equal share to the each party of the said agreement after all costs and expenses are fully paid." The affidavit further set up that Stanley had sold and conveyed the Lawrence Avenue property for the Keeler Avenue property; that Stanley had not made an accounting or distribution of any moneys "to Peter Bass so which he was entitled under the terms of said agreement and that said affidavit states that he has a right, title and interest in the property described, to-wit: (describing the Keeler Avenue property.) That the affidavit is filed for the purpose of notifying all persons of the interest here in the Keeler Avenue property.

More than 6 months thereafter, viz., January 10, 1940, Stanley and his wife conveyed the Keeler Avenue property by warranty deed to defendant, Kolodias and wife, in exchange for property conveyed by the Kolodias at 2424 So. Troy Avenue to Stanley and wife, March 1, 1940, following, the complaint in the instant case was filed.

There is further evidence to the effect that shortly after the deal to purchase the Lawrence Avenue property was agreed upon, each plaintiff agreed to give Stanley \$100, being a part of their proportionate share of the purchase price to Stanley would be \$3,800. Plaintiff take a different view of this evidence and say this was part of the purchase money which they paid in accordance with the

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agreement entered into between the three.

There is a great deal of other evidence in the record but we think it unnecessary to mention it further. The master, among other things, found that Stanley was born in Poland in 1892; came to America in 1909 and was naturalized in 1916; that he learned to write his name in English but from the master's observation he found that Stanley "is practically illiterate as far as the English language, at least, is concerned." That plaintiff Brown was a real estate man in Chicago and had been acquainted with Stanley for about 18 years and they were "pals," or very friendly. That Stanley was introduced by Brown to plaintiff Bass in March, 1938; that Brown speaks and reads English fluently and operates a typewriter; that Bass is Polish and testified through an interpreter; that Raymond Brown is the son of Edward Brown; that he had nothing to do with the transaction except to act as a dummy to hold the title at the request of his father; that Stanley was a "painting contractor in a small way," and did some work for Brown and Brown's friends and would drop in at Brown's real estate office nearly every week.

The master continues and finds the facts about the purchase of the Lawrence avenue property and finds that according to Stanley's testimony, Brown said that in case the Lawrence avenue property was sold their real estate commission would be \$500 and that he and Bass each agreed to give \$100 to Stanley so that the property could be bought by defendant for \$8,800 net and this was agreed upon.

The master then finds the facts substantially as above stated and that shortly after the conveyance of the Lawrence avenue property, Stanley found the title was in Raymond Brown and there was considerable argument between the parties "including the mention of some activity on the part of the State's Attorney of Cook County," and about that time Raymond Brown conveyed the property by quit claim deed to Stanley; that the evidence is very conflicting and "that after a study of the testimony in this case, and the

agreement entered into between the three.

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The master continues and finds the facts about the purchase of the Lawrence Avenue property and finds that according to Stanley's testimony, Brown said that in case the Lawrence Avenue property was sold their real estate commission would be \$500 and that he and Bass each agreed to give \$100 to Stanley so that the property could be bought by defendant for \$1,800 net and this was agreed upon.

The master then finds the facts substantially as above stated and that shortly after the conveyance of the Lawrence Avenue property, Stanley found the title was in Raymond Brown and there was considerable argument between the parties "including the mention of some activity on the part of the State's Attorney of Cook County," and about that time Raymond Brown conveyed the property by deed claim deed to Stanley; that the evidence is very conflicting and "that after a study of the testimony in this case, and the

6.

demeanor and apparent honesty of the witnesses, the Master is convinced that no partnership exists, that the agreement is signed by Peter Bass, Edward W. Brown, Raymond P. Brown and Stanley Wawrzonek and recites a division of one-third in equal shares to all parties which is impossible. That the agreement is sharp practice on the part of the plaintiffs, who are versed in real estate, and particularly, Edward W. Brown, who speaks English fluently and had the absolute confidence of Stanley Wawrzonek. That there is no consideration for the agreement and that it is unenforceable.***

"That the defendant Wawrzonek, at the time of the closing of the deal, did not understand that Raymond P. Brown was to take or retain title,*** and had signed the mortgage or that Raymond P. Brown was also signing the mortgage." And that when Stanley found the title was not in him he made a great outcry which resulted in Raymond Brown conveying the premises to him by quit claim deed; "that from the evidence the Master believes and finds that the plaintiffs have attempted to perpetrate a clever real estate deal amounting to a fraud, upon an illiterate and ignorant person who trusted implicitly in one of the plaintiffs, Edward W. Brown, whom he had known for some 18 years, ***. That the plaintiffs put no money in this transaction whatsoever, but received payment for their services as real estate brokers and that the payment to them of their regular commission as such brokers is pursuant to contract and ample and proper compensation." The decree finds the facts as found by the master.

Counsel for plaintiffs say that "The transaction between the parties was a joint adventure" and not a partnership and that the master and court, in finding that there was no partnership were in error. We think this argument is wholly immaterial. Whether the transaction was a partnership or a joint adventure, the rights of the parties in the instant case would be the same. Hagerman v. Schulte, 349 Ill. 11. In that case the court said: "A joint adventure is not identical with a partnership. While a joint adventure is not regarded as identical with a partnership, the relation of the parties is so similar that their

generous and apparent honesty of the witnesses, the Master is convinced that no partnership exists, that the agreement is signed by Peter Bass, Edward W. Brown, Raymond P. Brown and Stanley Lawton and recites a division of one-third in equal shares to all parties and which is impossible. That the agreement is sharp practice on the part of the plaintiffs, who are versed in real estate, and particularly Edward W. Brown, who speaks English fluently and had the absolute confidence of Stanley Lawton. That there is no consideration for the agreement and that it is unenforceable.***

"That the defendant Lawton, at the time of the closing of the deal, did not understand that Raymond P. Brown was to take or retain title,"*** and had signed the mortgage or that Raymond P. Brown was also signing the mortgage." And that when Stanley found the title was not in him he made a great outcry which resulted in Raymond Brown conveying the premises to him by deed of gift; "that from the evidence the Master believes and finds that the plaintiffs have attempted to perpetrate a clever real estate deal amounting to a fraud upon an illiterate and ignorant person who trusted implicitly in one of the plaintiffs, Edward W. Brown, whom he had known for some 18 years.*** That the plaintiffs put no money in this transaction whatsoever, but received payment for their services as real estate brokers and that the payment to them of their regular commission as such brokers is pursuant to contract and ample and proper compensation." The Master finds the facts as found by the Master.

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rights and liabilities are usually tested by the rules which govern partnerships. (Keiswetter v. Rubenstein, 235 Mich. 36.) The relation between joint adventurers is fiduciary in its nature, and their conduct to one another must be governed by the utmost confidence and good faith."

Whether the Lawrence avenue property was purchased for the benefit of the 3 parties, plaintiffs and defendant Stanley, or whether the property was bought alone by Stanley is to be determined from a consideration of all the evidence. The master found in favor of defendant that he had been overreached by plaintiffs and that the suit should be dismissed for want of equity at plaintiffs' costs. This finding was sustained by the chancellor. But counsel for plaintiffs say that the finding in the decree is against the manifest weight of the evidence. We have considered all the evidence in the record and the argument made by counsel for both parties and we are unable to say that the finding of the master, approved by the chancellor, is against the manifest weight of the evidence. In these circumstances, we are not warranted in disturbing the decree. Litwin v. Litwin, 375 Ill. 90; Phillips v. W. G. N. Inc., 307 Ill. App. 1.

The decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, P.J., and McSurely, J., concur.

rights and liabilities are usually tested by the rules which govern partnerships. (Kelster v. Hubert, 105 Mich. 381.) The relation between joint adventure is likewise in the nature, and their conduct to one another must be governed by the same principles and rules of law.

Whether the license was properly and lawfully obtained for the benefit of the 3 parties, plaintiffs and defendant jointly, or whether the property was bought alone by Stanley is to be determined from a consideration of all the evidence. The master found in favor of defendant that he had been overreached by plaintiffs and that the suit should be dismissed for want of equity of plaintiffs' case. This finding was sustained by the court. It is not unusual for plaintiffs to say that the finding in the decree is against the weight of the evidence. We have considered all the evidence in the record and the argument made by counsel for both parties and are unable to say that the finding of the master, approved by the chancellor, is against the weight of the evidence. In these circumstances, we are not warranted in disturbing the decree. Wright v. Wright, 275 Ill. 40; Phillips v. G. W. Lee, 207 Ill. 400, 11.

The decree of the superior court of Cook County is affirmed.

JUDGE OF THE COURT.

Kelster, J., and McHenry, J., concur.

42352

SAMUEL ROSENFELD,

Appellee,

v.

CHICAGOAN, INC.,

Appellant.

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

318 I.A. 234

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of the 4th class in the Municipal court of Chicago, to recover damages claimed to have been sustained by him on account of defendant's negligence. Defendant denied liability, there was a trial before the court without a jury, a finding and judgment in plaintiff's favor, his damages assessed at "\$400 in tort" and defendant appeals.

The record discloses that plaintiff was a salesman employed by the United Equipment Corporation selling a device for cleaning out stoppage in drains and sewers known as "Hydromatic Air Gun." There was a clogged sewer pipe in the floor of the kitchen of defendant's hotel and plaintiff was called by defendant's representative to see if he could clear the sewer pipe by using the hydromatic air gun, which might result in the sale of a "gun." Plaintiff went to the hotel taking the "gun" with him and the chief engineer of the hotel showed him the pipe that was clogged. Plaintiff attached the machine to the drain hole and released the air which apparently was the proper way to operate the "gun." There was another hole in the floor close behind the place plaintiff was standing and when he applied the air pressure, some fluid came up out of the other pipe and struck him on his seat and legs. This fluid contained chemicals, plaintiff's clothing was damaged and he was burned. There is a dispute in the evidence as to whether the superintendent of the hotel, who showed plaintiff the

SAMUEL ROSS WELLS,

Appellee,

v.

CHICAGO, INC.,

Appellant.

NO. 10111 2-10-18
OF CHICAGO.

3101A.234

MR. JUSTICE CONNOR DELIVERED THE OPINION OF THE COURT.

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The record discloses that plaintiff was a telephone employe by the United Equipment Corporation selling a device for cleaning out stoppage in drains and sewers known as "hydrostatic air gun." There was a clogged sewer pipe in the floor of the kitchen of defendant's hotel and plaintiff was called by defendant's representative to see if he could clear the sewer pipe by using the hydrostatic air gun, which might result in the sale of a "gun." Plaintiff went to the hotel taking the "gun" with him and the chief engineer of the hotel asked him the pipe that was clogged. Plaintiff released the machine to the drain hole and released the air which apparently was the means by which to operate the "gun." There was another hole in the floor of the kitchen the place plaintiff was standing and when he applied the air pressure, some fluid came up out of the other pipe and struck him in the face and legs. This fluid contained chemicals, plaintiff's clothing was damaged and he was burned. There is a dispute in the evidence as to whether the superintendent of the hotel, who owned plaintiff's

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source of the trouble, told plaintiff that they had been working on the clogged pipe with "hot stuff." On this question the superintendent, Mr. Shoemaker, testified that plaintiff came to the hotel to demonstrate a "pneumatic gun to clean out a drain;" that plaintiff "pumped up air pressure in the gun he was demonstrating, placed it over an opening in the floor, pulled the trigger and released the air into the opening." He further testified that he "knew nothing of the operation of the gun or how it worked;" that there was another opening in the floor about 17 inches away from the one that was clogged; that there was nothing over the hole, no rag or anything; that before plaintiff put the gun in the hole and released the air, the witness told him "that the drain was clogged and that 'we had been working on it with hot stuff.'"

Plaintiff testified that Mr. Shoemaker was the chief engineer of the defendant hotel; that plaintiff went to the hotel in response to a call from Mr. Shoemaker; that he was informed there was a stoppage in a pipe at the hotel and that they wanted to buy one of the guns; that he went to the hotel and explained to Mr. Shoemaker how the gun and its attachment operated. That it was used to blow out stoppage in drain pipes; that Mr. Shoemaker said there was stoppage there and if the witness could clear it out he would buy the gun. Plaintiff further testified he did not know there was an opening in the floor near the pipe in question; that he put the gun in place, released the air and some substance struck him in the back, coming out of the other pipe; that the substance was sticky and he began to feel a burning sensation. A doctor was called and gave him first aid. On cross-examination he testified that the hole, out of which the fluid came which burned him, was covered with a rag. He further testified that no one told him about the other hole in the floor and that after the accident Mr. Shoemaker said: "' Oh, I forgot to tell you about that hole. You had better get your clothes off right away because that stuff will burn your leg off.' Shoemaker did not tell him and he did not know what was in the drain before

source of the trouble, told plaintiff that they had been working on the clogged pipe with "hot stuff." On this question the superintendent, Mr. Shoemaker, testified that plaintiff came to the hotel to demonstrate a "pneumatic gun to clean out a drain;" that plaintiff "pumped up air pressure in the gun to some demonstration," placed it over an opening in the floor, pulled the trigger and released the air into the opening. He further testified that he "knew nothing of the operation of the gun or how it worked;" that there was another opening in the floor about 14 inches away from the one that was clogged; that there was nothing over the hole, no rag or anything; that before plaintiff put the gun in the hole and released the air, the witness told him "that the drain was clogged and that it had been working on it with hot stuff."

Plaintiff testified that Mr. Shoemaker was the chief engineer of the defendant hotel; that plaintiff went to the hotel in response to a call from Mr. Shoemaker; that he was informed there was a stoppage in a pipe at the hotel and that they wanted to buy one of the guns; that he went to the hotel and explained to Mr. Shoemaker how the gun and its attachment operated. That it was used to blow out stoppage in drain pipes; that Mr. Shoemaker said there was stoppage there and if the witness could clear it out he would buy the gun. Plaintiff further testified he did not know there was an opening in the floor near the pipe in question; that he put the gun in place, released the air and some substance struck him in the back, coming out of the other pipe; that the substance was sticky and he began to feel a burning sensation. A doctor was called and gave him first aid. On cross-examination he testified that the hole, out of which the fluid came which burned him, was covered with a rag. He further testified that no one told him about the other hole in the floor and that after the accident Mr. Shoemaker said: "Oh, I forgot to tell you about that hole. You had better get your clothes off right away because that stuff will burn your leg off." Shoemaker did not tell him and he did not know what was in the drain before.

3.

he shot it."

Counsel for defendant contend that plaintiff's statement of claim did not state a cause of action and therefore the judgment should be reversed. There is no merit in this contention. Rule 27 of the Municipal court provides: "(1) All pleadings shall contain a plain and concise statement of the pleader's cause of action, counterclaim, defense or reply. *** (3) Pleadings shall be liberally construed with a view to doing substantial justice between the parties." Par. 3 of Rule 37 of that court is as follows: "(3) All defects in pleadings, either in form or substance, not objected to in the trial court prior to trial, shall be deemed to be waived." Par. 3, of §42, of the Civil Practice act, ch. 110, Ill. Rev. Stats. 1941 provides: "All defects in pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived."

No objection was urged to the pleadings in the trial court and under the rules of the Municipal court and §42 of the Civil Practice Act, above quoted, no such question can be urged for the first time in a court of review. See Albers v. Dressel, 307 Ill. App. 470, and pages there cited.

Defendant further contends that before plaintiff can recover he must show by a preponderance of the evidence that he was in the exercise of due care for his own safety and that the defendant was guilty of negligence which proximately caused the injury. We think this is a correct statement of the law and the question was for the court to decide from the evidence. Upon a consideration of all the evidence in the record we are unable to say that the finding in favor of plaintiff is against the manifest weight of the evidence. In these circumstances we are not warranted in disturbing the finding and judgment of the trial judge who saw and heard the witnesses.

A further complaint is made that the evidence as to plaintiff's claimed loss of earnings was speculative and improperly admitted because it was not the best evidence. In support of this counsel se

he shot it."

Counsel for defendant contends that plaintiff's statement of claim did not state a cause of action and therefore the judgment should be reversed. There is no merit in this contention. Rule 27 of the Municipal Court provides: "(1) All pleadings shall contain a plain and concise statement of the pleader's cause of action, counterclaim, defense or reply. ** (5) Pleadings shall be liberally construed with a view to doing substantial justice between the parties." Part 3 of Rule 27 of that court is as follows: "(3) All defects in pleadings, either in form or substance, not objected to in the trial court prior to trial, shall be deemed to be waived." Part 3, of 442, of the Civil Practice Act, Ch. 150, Ill. Rev. Stat. 1941 provides: "All defects in pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived."

No objection was urged to the pleadings in the trial court and under the rules of the Municipal Court and 442 of the Civil Practice Act, above quoted, no such question can be urged for the first time in a court of review. See Albers v. Harsanyi, 307 Ill. App. 470, and cases there cited.

Defendant further contends that before plaintiff can recover he must show by a preponderance of the evidence that he was in the exercise of due care for his own safety and that the defendant was guilty of negligence which proximately caused the injury. We think this is a correct statement of the law and the question was for the court to decide from the evidence. Upon a consideration of all the evidence in the record we are unable to say that the finding in favor of plaintiff is against the manifest weight of the evidence. In these circumstances we are not warranted in disturbing the finding and judgment of the trial judge who saw and heard the witnesses.

A further complaint is made that the evidence as to plaintiff's claimed loss of earnings was speculative and improperly admitted because it was not the best evidence. In support of this complaint

4.

plaintiff called two witnesses, himself and the physician who rendered first aid; that plaintiff testified he was treated by another doctor 4 or 5 times "but the doctor was not produced, neither was the plaintiff's wife or any member of his household, or any fellow employee;" that plaintiff's testimony as to the amount of his weekly earnings which he lost while laid up was "entirely uncorroborated," and that plaintiff's testimony in this respect was erroneously admitted over defendant's objection because the books of account which were kept by plaintiff's employer were not produced and the explanation was that the books had been lost or could not be found. We think there is no merit in this contention; whether the books were produced or not, plaintiff could testify to the amount of money he had received from his employment.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, P.J., concurs.

McSurely, J., dissents in part:

I dissent on the ground that in my opinion, the evidence fails to show that plaintiff was in the exercise of due care or that defendant was guilty of negligence.

plaintiff called two witnesses, himself and the physician who rendered first aid; that plaintiff testified he was treated by another doctor 4 or 5 times "but the doctor was not produced, neither was any plaintiff's wife or any member of his household, or any fellow employee; that plaintiff's testimony as to the amount of his weekly earnings which he lost while laid up was "entirely uncorroborated," and that plaintiff's testimony in this respect was erroneously admitted over defendant's objection because the books of account which were kept by plaintiff's employer were not produced and the explanation was that the books had been lost or could not be found. We think there is no merit in this contention; whether the books were produced or not, plaintiff could testify to the amount of money he had received from his employment.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

WATSON, P.J., concurs.
McSweeney, J., dissents in part:

I dissent on the ground that in my opinion, the evidence fails to show that plaintiff was in the exercise of due care or that defendant was guilty of negligence.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 937³

February 3
~~October~~ Term A. D. 1949

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error

vs

WILLIAM A. DOSS,

Plaintiff in Error

Agenda No. 1.

Error To
~~Appeal from~~
Circuit Court
Piatt County.

RIESS, P. J.:

318 I.A. 2873

Plaintiff in Error, William A. Doss, who was the defendant in the trial court, seeks review and reversal of a judgment of conviction and sentence on a statutory misdemeanor charge of criminal libel set forth in an indictment returned by the Grand Jury of Piatt County. After motion to quash the indictment was denied, trial by jury was had under Defendant's plea of not guilty and a verdict of guilty was returned by the jury under the first count of the indictment. Motion to set aside the verdict and grant a new trial was denied by the Court and the judgment of conviction and sentence then followed. The record was perfected and the cause was improperly taken to the Supreme Court on § Writ of Error. Defendant contended that constitutional questions and statutory interpretations were involved but the case was transferred to this Court for want of jurisdiction in the Supreme Court as not involving any constitutional questions or the validity of a statute and because the crime alleged is a misdemeanor.

The indictment charged in substance that the defendant, with unlawful and malicious intent to vilify and defame one Carl I. Glasgow, State's Attorney of Piatt County, and to bring him into public scandal and disgrace, "unlawfully and maliciously did compose, print and publish and cause and procure to be composed, printed and published in a certain publication in the City of Monticello, in said County of Piatt and State of Illinois, called The Liberty Press, in Issue No. 12 thereof,

a certain false, scandalous, malicious and defamatory libel of and concerning the said Carl I. Glasgow, containing there, among other things, the false, malicious, defamatory and libelous words as follows:"

"Carl Glasgow (meaning Carl I. Glasgow) is not a fair and impartial prosecutor,--no sir, (1) in the Muse case I say he (meaning Carl I. Glasgow) is either persecutor, or an unfair prosecutor there, (2) in the Ard case, or should be case, he (meaning Carl I. Glasgow) wrongfully shields that man; (3) (a) in the recent Bell Criminal Case he (meaning Carl I. Glasgow) wrongfully fails to prosecute; (b) and that was my truck more than the Bell's for which we got out the complaint, I wrote it; he (meaning Carl I. Glasgow) wrongfully uses and bargains the dismissal of that Criminal case, totally ignores my rights as a citizen, to get the sheriff his (meaning Carl I. Glasgow) client out of a bad civil damage suit!; (4) He (meaning Carl I. Glasgow) basely and wrongfully threatened and asserted falsely to Dwight Doss, as a fact that father Muse would be indicted for bribery in that bastardy case! unless (?) or if (?) somebody (?) did not do?? What did he (meaning Carl I. Glasgow) mean? He (meaning Carl I. Glasgow) failed on this threat! Why did he (meaning Carl I. Glasgow) make it?

"Yes, in my judgment Carl Glasgow (meaning Carl I. Glasgow) would have a hard time, a very hard time indeed,--to save his States Attorney commission in not being taken from him (meaning Carl I. Glasgow), if he (meaning Carl I. Glasgow) were prosecuted for these and various acts of malfeasance in office (meaning thereby to charge that the said Carl I. Glasgow had been guilty of the crime of malfeasance in office) and I think he (meaning Carl I. Glasgow) could be disbarred,--(meaning thereby to charge that the said Carl I. Glasgow had been guilty of conduct unbecoming a member of the legal profession to such an extent that his license to practice law could be taken from him by the Supreme Court of the State of Illinois) but he (meaning Carl I. Glasgow) need not worry, I'll give him (meaning Carl I. Glasgow) no such direct trouble--I'll do mine locally and all in the open,-- and right thru "Liberty" so if I am wrong on my facts or actions, I am liable for damages and ready to go to jail, but I think the public is honest and fair, and it will stand by me now, it begins to see things!; I know I have tackled a glean-tic machine, tis a big one, it goes all over Platt County and even over into other counties for their help,--but I'm watching those angles too!"

The second count of the indictment similarly recited the publication of alleged false, malicious, defamatory and libelous words concerning said Glasgow as follows:

of the following: "The following are the names of the persons who have been convicted of the crime of murder in the State of New York, and who have been sentenced to death, during the year 1900: ..."

1. John Doe, convicted of the murder of Jane Smith, sentenced to death on January 1, 1900.
2. John Doe, convicted of the murder of Jane Smith, sentenced to death on January 1, 1900.
3. John Doe, convicted of the murder of Jane Smith, sentenced to death on January 1, 1900.
4. John Doe, convicted of the murder of Jane Smith, sentenced to death on January 1, 1900.
5. John Doe, convicted of the murder of Jane Smith, sentenced to death on January 1, 1900.
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11. John Doe, convicted of the murder of Jane Smith, sentenced to death on January 1, 1900.
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18. John Doe, convicted of the murder of Jane Smith, sentenced to death on January 1, 1900.
19. John Doe, convicted of the murder of Jane Smith, sentenced to death on January 1, 1900.
20. John Doe, convicted of the murder of Jane Smith, sentenced to death on January 1, 1900.

The above names of the persons who have been convicted of the crime of murder in the State of New York, and who have been sentenced to death, during the year 1900, are given for the purpose of information.

"I propose now to send a statement of this situation to the office of the Governor and Attorney General of Illinois and to the President and Secretary of the State Bar Association and to H. E. Hutson, as President of the Piatt County Bar Association--if that sort of a lying and deceitful man (meaning Carl I. Glasgow and meaning thereby to charge that the said Carl I. Glasgow was untruthful, a liar and a cheat) can fill the State's Attorneys' chair of this County--then, indeed, is the life, liberty and property of every person in jeopardy who happens to refuse to swear allegiance to the "Monticello Bar Gang Attorneys".

The jury found the defendant guilty under the first count of the indictment. Among the facts shown in the voluminous record herein, it appears that a paper called "The Liberty Press" was published by the Defendant in the City of Monticello, Piatt County, Illinois. That in the Issue of April 24, 1941, being the 12th Issue of such paper which was published at irregular intervals during each month, the printed language which was composed by defendant and quoted in the first count of the indictment, appeared in such publication. It was shown that Carl I. Glasgow was State's Attorney of said county; that the defendant owned, operated and published the above paper including said Issue, and distributed the same by mail, delivery, or other means to the subscribers and to other persons to whom the same was sold or delivered, which latter facts were admitted by the Defendant, whose defense was that the articles complained of were true and were published with good motives and for justifiable ends. Issues of the paper in question were admitted in evidence and appear in the record and abstract. Issue No. 14 thereof, dated May 10, 1941, and so admitted in evidence as People's Exhibit 3, contained the following, among other articles:

"Yes, Attorneys, I'll be home before that issue comes out, and besides you'll have time later anyway to save yourselves an undressing further, by injunctions, etc., if you wish, and if you can stop it that way--because a direct libel or slander suit will not stop it, only as to such of you who may be plaintiffs, just to get some one else to sue me does not help you, as I see it; that only sharpens my memory to give the more facts on which they can see what your real characters are and they are beginning now to see, I think. They have misjudged some of you by your reputations,--but then all in all it is up to the public, our jury, the greatest power I know of on this earth to weigh me and to

1. Property was to be sold at a minimum of \$100,000.00 and the proceeds were to be used for the purchase of a new building and the purchase of a new building and the purchase of a new building.

[illegible][illegible]

weigh you separately. My day has come to call for that showdown on your gang conspiracy. Believe me, it took time and a lot of hard work to get the dope on you fellows, but fear not now boys, I know about all the holes you hid in--so you might as well come out--I've got the proof on you as a 'gang'; and if you don't believe me, sue for that libel.- I do not know how to libel you more, or I'd do it. You boys sure can take it when you have to!"

The abstract, brief, argument and reply brief prepared by the Defendant, appearing pro se, comprises 430 printed pages , of which the statement, brief and arguments consist of 168 printed pages, while the printed reply brief of plaintiff below comprises 41 pages. We have laboriously examined the said abstract and briefs and in many instances have found it necessary to refer back to the record to gain a clear understanding of what the same contained and of the numerous contentions of defendant in relation thereto. Forty-seven alleged errors were assigned in addition to numerous subdivisions thereof, which we deem it impossible to consider seriatim or in an orderly manner in this opinion. We will discuss several of such alleged errors, and the remainder, we have carefully examined and considered, but find no merit therein. Factually, we find that the charges set forth in the indictment, with innuendo clauses, charging the complaining witness with the conduct alleged in the first count of indictment and the publication thereof, ^{by the defendant,} were so composed and published and ~~were~~ libelous per se. That the same were not published for lawful and justifiable ends, was proven by an abundance of the evidence and beyond a reasonable doubt and the jury was amply justified in finding the defendant guilty of the offense of criminal libel as set forth in said count.

Certain contentions were made by the defendant under his motion to quash the indictment concerning the testimony heard before the Grand Jury and the acts of the prosecuting witness, special prosecutor and subsequent orders of the Court in relation thereto. The Trial Court properly held that the offer of affidavits of certain grand jurors as to what is alleged to have occurred and was testified to in the Grand Jury room, is not competent to impeach the indictment

found and duly returned by the grand jury into open Court. The People, etc., v. Aaron H. Miller, 264 Ill. 148, 106 N. E. 191; The People, etc., v. Benjamin A. Arnold, 248 Ill. 169, 93 N. E. 786; Thomas Blemer, alias etc., v. The People, etc., 76 Ill. 265 at 269; Jesse D. Ditchell v. The People, etc., 146 Ill. 175 at 185, 33 N. E. 757. The Trial Court committed no error in denying defendant's motion to quash the indictment. It may be here stated that even though incompetent evidence was admitted of witnesses who were called before the grand jury, an indictment will not be quashed unless all of the evidence or witnesses so submitted was incompetent. The People, etc., v. ^W_A Hartenbower, et al, 283 Ill. 591 at 605, 119 N. E. 605; The People, etc., v. Duncan 261 Ill. 339, 103 N. E. 1043; The People, etc., v. William E. Gould, et al, 345 Ill. 288, 178 N. E. 133.

We further hold that in calling a disinterested Judge from another Circuit on motion of defendant for change of venue from the then Presiding Judge, no error was committed. The petition of the grand jury, signed by its foreman and presented to the Presiding Judge for the appointment of a disinterested special prosecuting attorney to appear and act during the investigation of certain publications in The Liberty Press, because of the fact that the State's Attorney was an interested party, and the subsequent granting of said petition and appointment of a special State's Attorney to act in said investigation and cause was proper and we find no error therein. Clearly, the State's Attorney became and was an interested witness in relation thereto, hence the appointment of a special prosecutor to appear and represent the People in the investigation before the grand jury and during the trial of the cause, was both a legal and a proper exercise of its judicial authority and within the sound discretion of the Court, and we find no prejudicial error therein. ~~The State's Attorney properly appeared in all other cases.~~

Much evidence which was immaterial and tended only to inject collateral matters and issues and bring before the jury the

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The present case is a continuation of the case of the same name, which was decided by the Supreme Court in 1911. The case was brought by the State of New York against the defendant, who was a resident of New York. The defendant was charged with the crime of larceny, and the State sought to prove that he had stolen property from a certain person. The defendant denied the charge, and the case went to trial. The jury found the defendant guilty, and the court sentenced him to a term of imprisonment. The defendant appealed the conviction, and the case came before the Supreme Court. The Court affirmed the conviction, and the defendant was sentenced to a term of imprisonment.

various personal and professional grievances ^{and differences} /which had arisen between defendant and other members of the bench and bar of said county, was repeatedly sought to be introduced by the defendant. The instances are so very numerous that we cannot discuss them separately, but from a careful consideration thereof, we find no prejudicial error in the rulings of the Court in relation thereto. Also, it is complained that when the defendant brought into the court room three alleged stenographers, or some of them, within the rail of the bar, and one of whom was permitted to sit at the counsel table with defendant who conducted the entire trial as his own attorney, but who were not permitted to report the proceedings within such bar, were not, in our opinion, calculated to adversely affect or prejudice the rights of the defendant during the trial. The Court was charged with both the duty and the exercise of a sound discretion in requiring orderly procedure in the conduct of the trial and unless it appears that the defendant has suffered prejudicial effects by arbitrary or erroneous rulings or conduct during such procedure, he may not justly complain. In many instances throughout the trial and the numerous conferences which were held with the Judge outside of the hearing of the jury, it appeared that it was seemingly impossible for the Judge, however patient he might be, to try the case in an orderly and circumspect manner because of the persistent contumacious conduct and attitude of the defendant who acted as his own counsel throughout the trial. The Court owes a duty to both the People and to the Defendant in that, as far as possible, a fair, orderly and impartial trial may be had by all parties. If defendant, while so acting as his own attorney, thus created conditions which brought about necessarily stringent rulings by the Court, he cannot be heard to complain. The vindictive attitude exhibited and shown throughout defendant's briefs toward the prosecuting witness, the special prosecutor, the Court and many members

and differences between the two parties, the court has not been able to determine the exact nature of the relationship between them. The court has, however, found that the relationship is one of partnership, and that the parties are entitled to share equally in the profits and losses of the business.

of the bar of Piatt county was similarly reflected in his attitude throughout ^{the} trial, and this same spirit was clearly evidenced in the articles appearing in The Liberty Press which were duly admitted in evidence. It may well be said concerning the libelous nature of such articles which concerned the prosecuting witness and other members of the bar of said county, concerning whom the Defendant contended that the prosecuting witness was in a "gang" conspiracy, is most clearly expressed in Defendant's own language, as follows: "My day has come to call for that showdown on your gang conspiracy. Believe me, it took time and a lot of hard work to get the dope on you fellows, but fear not now boys, I know about all the holes you hid in--so you might as well come out--I've got the proof on you as a "gang", and if you don't believe me, sue for that libel,--I do not know how to libel you more, or I'd do it. You boys sure can take it when you have to!" Language could not well express words of malicious intent more forcibly, and in order to establish his defense thereto, it devolved upon defendant to prove the truth of the charges set forth in the first count of the indictment and that the same were published without malice and for justifiable ends. Unfortunately ^{for} the defendant ^{he} was unable to produce competent, material and relevant testimony to raise a reasonable doubt in the minds of the jury as to his purposes and intent in publishing and broadcasting such libelous and allegedly false statements with either good motives or for justifiable ends.

A libel is a malicious defamation, expressed either by printing or by signs or pictures or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule or financial injury. Chapter 38, Section 402, Illinois Revised Statute. The Illinois Statute, Section 403, supra, further provides that every person, whether writer or publisher, convicted of libel, shall be fined not exceeding \$500, or confined in the county jail not ex-

[illegible]

ceeding one year. In all prosecutions for libel, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense. The burden of proving that defense rests upon the defendant. The People, etc. v. Edward C. Fuller, 238 Ill. 116, 87 N. E. 336; The People, etc., v. Andrew A. Strauch, 247 Ill. 280, 93 N. E. 126; The People, etc. v. Julius F. Taylor, 279 Ill. 481, 117 N. E. 62.

We have further examined all of the instructions to the giving or refusal of which the defendant objected, and which were discussed in his brief, but we find no prejudicial nor reversible error therein.

From an examination of the whole of the record and consideration of the various errors assigned, we find and hold that the defendant was given a fair trial and that the jury was amply justified under the evidence, in holding the guilt of the defendant to have been established beyond a reasonable doubt and that no reversible error appears in the record. The judgment of the Circuit Court of Platt County is therefore affirmed.

JUDGMENT AFFIRMED.

abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

318 I.A. 288¹

February Term, A.D. 1943

General No. 9374.

Agenda No. 15.

VIRGINIA ZIEGLER, LILLIAN
PADGETT, RAY PADGETT and
DORIS PADGETT,

Plaintiffs-Appellants

-vs-

ARTHUR PERBIX, MYRA PERBIX,
ELLIOTT STATE BANK, WALTER
BELLATTI,

Defendants-Appellees.

Appeal from the
Circuit Court of Morgan
County, Illinois.

DADY, J.

This proceeding was commenced in the circuit court on
November 6, 1939, the complaint consisting of three counts.

By the third count Lillian Padgett, one of the plaintiffs,
herein referred to as Mrs. Padgett, charged her former attorney with
misconduct. It is conceded that the alleged cause of action against
him was abandoned in the trial court and is not before us on this
appeal.

By the first count all of the plaintiffs, as heirs of
Charles H. Padgett, deceased, seek to redeem certain real estate
from a foreclosure sale, or in the alternative to recover damages
from Elliott State Bank, Arthur Perbix and Walter Bellatti.

By the second count Mrs. Padgett, as a judgment creditor
of the original mortgagors, seeks to redeem from such foreclosure
sale, or in the alternative to recover damages from all defendants
except such former attorney.

2025

318 L.A. 388

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February 1933

Illinois No. 15.

General No. 9374.

VIRGINIA KIEHLER, WILLIAM
SABETT, RAY PIGEON and
LOUIS BAGGETT,

Plaintiffs-Appellants

-vs-

LEONARD KIEHLER, MYRA KIEHLER,
ELIOTT STATE BANK, WALTER
BILKATZ,

Defendants-Appellees.

DADY, J.

This proceeding was commenced in the circuit court on

November 8, 1932, the complaint consisting of three counts.

By the third count William Baggett, one of the plaintiffs, herein referred to as Mrs. Baggett, charged her former attorney with misconduct. It is conceded that the alleged cause of action against him was abandoned in the trial court and is not before us on this appeal.

By the first count all of the defendants, as heirs of Charles E. Baggett, deceased, seek to recover certain real estate from a foreclosure sale, or in the alternative to recover damages from Elliott State Bank, Arthur Kiehl and Walter Bilkatz.

By the second count Mrs. Baggett, as a judgment creditor of the original mortgage, seeks to recover from each defendant sale, or in the alternative to recover damages from all defendants except such former attorney.

Defendants have made a motion to dismiss the appeal.

It appears that on March 11, 1942, the supreme court entered an order allowing the plaintiffs' petition for leave to appeal the present cause to the supreme court. On September 21, 1942, the supreme court entered an order transferring the cause to this appellate court. (See Ziegler v. Perbix, 38⁹ Ill. 264.) Defendants state in their motion that such order of the supreme court found that such court did not have jurisdiction of the cause, and now contend that therefore the supreme court had no jurisdiction to enter the order allowing the plaintiffs to appeal to such court. We have examined a certified copy of the order entered by the supreme court on September 21, 1942. The order did not state that such court found that it did not have jurisdiction, but the order merely found that the cause had been wrongfully appealed to such court. Moreover on September 26, 1942, the defendants moved the supreme court to vacate the order of September 21, 1942, and to dismiss the appeal to such court, contending in the motion that the supreme court had found it did not have jurisdiction of the cause, and contending therein that such court had no jurisdiction to enter the order allowing the appeal. On September 2, 1942, the supreme court entered an order dismissing such motion of the defendants. We consider there is no merit to the present motion to dismiss the appeal and the same is denied.

After the case was at issue it was referred to a master in chancery who heard the proofs and filed a report recommending that the complaint be dismissed for want of equity. The chancellor overruled exceptions to the report and entered a decree approving the report and dismissing the complaint for want of equity. Plaintiffs appeal.

Defendants have made a motion to dismiss the writ.

It appears that on March 11, 1944, the Supreme Court entered an order allowing the plaintiff's petition for leave to appeal the present cause to the Supreme Court. On September 11, 1944, the

Supreme Court entered an order transferring the cause to this appellate court. (See *Allegier v. Patrick*, 308 Ill. 284.)

As to its jurisdiction, the Supreme Court found that it did not have jurisdiction of the cause, and

now contend that therefore the Supreme Court had no jurisdiction to enter the order allowing the plaintiff to appeal to such court.

We have examined a certified copy of the order entered by the

Supreme Court on September 11, 1944. The order did not state that

such court found that it did not have jurisdiction, but the order

merely found that the cause had been wrongfully appealed to such

court. Moreover on September 25, 1944, the defendant moved the

Supreme Court to vacate the order of September 11, 1944, and to

dismiss the appeal to such court, contending in the motion that

the Supreme Court found it did not have jurisdiction of the

cause, and contending therein that such court has no jurisdiction

to enter the order allowing the appeal. On December 2, 1944, the

Supreme Court entered an order dismissing such motion of the de-

fendant. We consider there is no basis for any present motion to

dismiss the appeal and the same is denied.

After the case was at issue it was referred to a master

in chancery who heard the proofs and filed a report recommending

that the complaint be dismissed for want of equity. The defendant

overruled exceptions to the report and entered a decree dismissing

the report and dismissing the complaint for want of equity. Plaintiff

files appeal.

The real estate in question is located in the City of Jacksonville. At all of the times in question it was improved with a residence and with a garage building.

On June 24, 1930, Arthur Ziegler and Virginia Ziegler, who were husband and wife and the then owners, conveyed said real estate by mortgage to First State Trust & Savings Bank, of Springfield, hereafter referred to as "Savings Bank", to secure their indebtedness to the bank of \$15,000. On June 24, 1935, the Savings Bank filed in the circuit court a proceeding to foreclose such mortgage. On September 26, 1935, a decree of foreclosure was entered pursuant to which the premises were sold by the master in chancery on October 26, 1935, to the Savings Bank for \$13,440. The Savings Bank, as purchaser, received a certificate of sale. This is the foreclosure sale sought to be redeemed from in the present proceeding.

On November 18, 1935, an order was entered in the circuit court approving the master's report of sale and allowing a deficiency decree of \$1494.44 in favor of the Savings Bank and against the Zieglers.

On November 4, 1935, Virginia Ziegler filed in the foreclosure proceeding a petition for the appointment of a receiver. On November 13, 1935, the Elliott State Bank, hereafter referred to as "the receiver," was appointed receiver on the petition of the Savings Bank as holder of the deficiency decree. Thereafter Walter Bellatti acted as attorney for such receiver, and during the pendency of the foreclosure proceeding he acted as attorney for the Savings Bank.

On November 19, 1935, the receiver filed a petition for

The real estate in question is located in the City of Jacksonville. At all of the times in question it was improved with a residence and with a garage building.

On June 24, 1935, Arthur Sieglar and Virginia Sieglar, who were husband and wife and the then owners, conveyed said real estate by mortgage to First State Trust & Savings Bank, of Springfield, hereafter referred to as "Savings Bank", to secure their indebtedness to the bank of \$15,000. On June 24, 1935, the Savings Bank filed in the circuit court a proceeding to foreclose such mortgage. On September 28, 1935, a decree of foreclosure was entered pursuant to which the premises were sold by the master in chancery on October 26, 1935, to the Savings Bank for \$13,440. The Savings Bank, as purchaser, received a certificate of sale. This is the foreclosure sale sought to be redeemed from in the present proceeding.

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On November 4, 1935, Virginia Sieglar filed in the foreclosure proceeding a petition for the appointment of a receiver. On November 13, 1935, the Elliott State Bank, hereafter referred to as "the receiver," was appointed receiver on the petition of the Savings Bank as holder of the deficiency decree. Thereafter Walter Bellatti acted as attorney for such receiver, and during the pendency of the foreclosure proceeding he acted as attorney for the Savings Bank.

On November 19, 1935, the receiver filed a petition for

leave to lease the garage property. On November 19, 1935, the circuit court entered an order on the petition of the receiver, which order found that \$200 per month rent was a fair rental for the garage property, and ordered the receiver to execute a lease of the entire garage property to one Poole at a rental of \$200 per month. Thereupon the receiver, pursuant to such order, leased the whole of the garage property to Poole for the remainder of the period of redemption at a rental of \$200 per month.

On December 28, 1935, Arthur Ziegler conveyed all of his interest in the real estate to Virginia Ziegler. On April 15, 1936, the First National Bank of Springfield, which bank was then the successor to the Savings Bank and as such successor the then owner and holder of the certificate of sale, ^{and of the deficiency decree,} sold and assigned such certificate and its rights under the deficiency decree to Arthur Perbix and Myra Perbix. They paid such First National Bank therefor \$14,934.44 by giving the bank \$3,000 in cash and the balance by way of a note executed by them. On June 29, 1936, Virginia Ziegler, being then divorced, conveyed her interest in said property to her father, Charles H. Padgett, subject to the lien of said mortgage.

On January 27, 1937, a master's deed was issued to Arthur Perbix and Myra Perbix, conveying the real estate to them as joint tenants, since which date they have held the legal title to all of said real estate, except a small portion thereof which they conveyed about May 20, 1937.

On November 6, 1939, Charles H. Padgett died intestate, leaving Mrs. Ziegler, Mrs. Padgett and Ray Padgett, his children, and Doris Padgett, his grandchild, as his only heirs at law.

On June 24, July 30 and September 26, 1935, respectively,

leave to lease the garage property. On November 18, 1935, the circuit court entered an order on the petition of the receiver, which order found that \$200 per month rent was a fair rental for the garage property, and ordered the receiver to execute a lease of the entire garage property to one Wolfe at a rental of \$200 per month. Thereupon the receiver, pursuant to such order, leased the whole of the garage property to Wolfe for the remainder of the period of redemption at a rental of \$200 per month.

On December 28, 1935, Arthur Siegel conveyed all of his interest in the real estate to Virginia Siegel. On April 15, 1936, the First National Bank of Springfield, which bank was then the successor to the Savings Bank and as such succeeded to ^{much of the defendant's interest} then owner and holder of the certificate of sale, sold and assigned such certificate and its right under the deficiency decree to Arthur Perlitz and Myra Perlitz. They sold such first National Bank therefor \$14,034.04 by giving the bank \$3,000 in cash and the balance by way of a note executed by them. On June 29, 1936, Virginia Siegel, being then divorced, conveyed her interest in said property to her father, Charles H. Siegel, subject to the lien of said mortgage.

On January 27, 1937, a master's deed was issued to Arthur Perlitz and Myra Perlitz, conveying the real estate to them as joint tenants, since which date they have held the legal title to all of said real estate, except a small portion thereof which they conveyed about May 30, 1937.

On November 3, 1937, Charles H. Siegel died intestate, leaving Mrs. Siegel, Mrs. Siegel and Ray Siegel, his children, and Doris Siegel, his grandchild, as his only heirs at law. On June 24, July 30 and September 28, 1935, respectively,

three judgments were entered in the circuit court against Arthur Ziegler and Virginia Ziegler. Sometime prior to January 26, 1927, Mrs. Padgett became the owner of such judgments by assignment. It is by virtue of such judgments and assignments that she claims the right to redeem.

In each of the first and second counts of the complaint it was alleged that the property foreclosed was of the value of \$30,000 at the time of the foreclosure sale; that at the time the receiver filed the petition for leave to lease the premises, the premises had, and the receiver knew the premises had, a rental value of \$300 per month, yet the receiver petitioned the court for leave to lease the property at a rental of \$200 per month; that the receiver and Bellatti wrongfully exercised the powers of such receivership for the purpose of leasing said premises at a rental below the real value, for the purpose of damaging the property and preventing a redemption; that by reason thereof the person entitled to make a redemption was prevented from obtaining a loan through the Reconstruction Finance Corporation or any other person that would have enabled such person to redeem; that Arthur Perbix in fact did not purchase the property at such sale, but took title for the benefit of three undisclosed persons, and that the receiver and Bellatti and Arthur Perbix worked and confederated together to prevent a redemption.

The first count charges that such alleged wrongful conduct was to prevent and did prevent Charles H. Padgett from redeeming; that Charles H. Padgett, through Virginia Ziegler, prior to the expiration of one year from the date of sale, offered to pay Arthur Perbix the amount due him, but that Arthur Perbix claimed he would not take any money for his rights in the premises, and

three judgments were entered in the circuit court against Arthur
Kieglar and Virginia Kieglar. Sometime prior to January 28, 1937,
Mrs. Baggett became the owner of such judgments by assignment.
It is by virtue of such judgments and assignments that she claims
the right to redeem.

In each of the first and second counts of the complaint
it was alleged that the property for leased was of the value of
\$30,000 at the time of the foreclosure sale; that at the time the
receiver filed the petition for leave to lease the premises, the
premises had, and the receiver knew the premises had, a rental
value of \$300 per month, yet the receiver petitioned the court for
leave to lease the property at a rental of \$150 per month; that
the receiver and Bellett wrongfully exercised the power of such
receivership for the purpose of leasing said premises at a rental
below the real value, for the purpose of depriving the property and
preventing a redemption; that by reason thereof the person entitled
to make a redemption was prevented from obtaining a loan through
the Reconstruction Finance Corporation or any other person that
would have enabled such person to redeem; that Arthur Parish in
fact did not purchase the property at such sale, but took title
for the benefit of three undisclosed persons, and that the receiver
and Bellett and Arthur Parish worked and conspired together to
prevent redemption.

The first count charges that such alleged wrongful conduct
was to prevent and did prevent Charles H. Baggett from realizing
that Charles H. Baggett, through Virginia Kieglar, prior to the
expiration of one year from the date of sale, offered to pay
Arthur Parish the amount due him, and that Arthur Parish claimed
he could not take any money for his right in the premises, and

stated that under no circumstances would he permit Charles H. Padgett to redeem if he could prevent it; that by reason thereof the deed to Arthur Perbix was fraudulent and should be set aside; that by reason thereof Charles H. Padgett was damaged to the extent of \$20,000 and that the plaintiffs, as his heirs at law have a right to maintain the proceeding. Myra Perbix, the wife of Arthur Perbix, was made a party defendant in the second count.

The second count charges that such alleged wrongful conduct was to prevent and did prevent Lillian Padgett from redeeming; that Lillian Padgett prior to the expiration of one year from the date of sale, offered to pay Arthur Perbix the amount due him, but that Arthur Perbix claimed he would not take any money for his rights in the premises, and stated that under no circumstances would he permit Lillian Padgett to redeem if he could prevent it; that by reason thereof the deed to Arthur Perbix was fraudulent and should be set aside; that by reason thereof Lillian Padgett was damaged, etc.

At the time the receiver filed its petition for leave to lease, Poole occupied and paid \$100 per month for a part of the garage building. At such time Mrs. Ziegler and her husband occupied the remainder.

Mrs. Ziegler testified that she told Bellatti she would take a lease of and pay \$250 per month for all of the garage property, except the part occupied by Poole, and that a Mrs. Rainey would guarantee payment of the rent, but that Bellatti said he would not accept Mrs. Rainey as a guarantor. Mrs. Rainey testified as a witness for the plaintiffs. In response to leading and suggestive questions, she stated "There was some negotiation - I cannot remember. I have been so very ill. I have forgotten. I

stated that under no circumstances would he permit Charles H. Patrick to redeem it; that by reason thereof the deed to Arthur Patrick was fraudulent and should be set aside; that by reason thereof Charles H. Patrick was damaged to the extent of \$10,000 and that the plaintiffs, as his heirs at law have a right to maintain the proceedings. Wm. Patrick, the wife of Arthur Patrick, was made a party defendant in the second count.

The second count charges that such alleged wrongful conduct was to prevent and did prevent William Patrick from receiving the deed to Arthur Patrick prior to the execution of one year from the date of sale, offered to pay Arthur Patrick the amount due him, but that Arthur Patrick claimed he would not take any money for his rights in the premises, and stated that under no circumstances would he permit William Patrick to redeem it; that by reason thereof the deed to Arthur Patrick was fraudulent and should be set aside; that by reason thereof William Patrick was damaged, etc.

At the time the receiver filed its petition for leave to lease, Poole occupied and paid \$100 per month for a part of the large building. At such time Mrs. Gleason and her husband occupied the remainder.

Mrs. Gleason testified that she told Bellotti she would take a lease of and pay \$100 per month for all of the property, except the part occupied by Poole, and that Mrs. Rainey would pay the payment of the rent, but that Bellotti said she would not accept Mrs. Rainey as a guarantor. Mrs. Rainey testified as a witness for the plaintiffs. In response to leading and suggestive questions, she stated "There was some negotiation - I cannot remember. I have been so very ill. I have forgotten.

remember discussing the value of the property, if that is what you want. * * * I am not logical. * * * I said 'Can I guarantee enough to be added to that so that you will be able to do that. * * * I will give you \$250. Would that help you'." We have carefully read all of the testimony of Mrs. Rainey as shown in the original transcript of the proceedings. Such testimony is so vague and uncertain that we consider it of no value in determining the issues. Bellatti, as a witness, denied that Mrs. Ziegler ever told him that Mrs. Rainey or any other person would guarantee the payment of the rent by Mrs. Ziegler.

Mrs. Ziegler testified that one Brown told her he would pay \$250 per month as rental for a portion of the garage, and that she told Bellatti over the 'phone of such offer. Brown testified he made her an offer of \$250 per month for a part of the garage and an offer of \$300 per month for the entire garage. Brown, however, never contacted Bellatti or any of the officers or agents of the receiver. Bellatti testified he had never heard of Brown as a possible renter. Rantz, vice-president and cashier of the receiver, testified that Mrs. Ziegler had never indicated to him that Brown was willing to rent the property. Johnson, the president of the receiver, testified that Mrs. Ziegler never submitted the name of any one who was willing to rent the garage. If Brown seriously considered renting the property it would seem unusual that he did not contact the receiver.

Storey and Exon, two real estate dealers, were the only witnesses for the plaintiff who were directly interrogated as to the rental value of the garage property. Storey placed it at \$300 per month, but Exon said he had no opinion as to the rental value. The president of the Savings Bank testified that before filing the petition for leave to rent, the bank contacted several

remember discussing the value of the property, it is not
your want. * * * I am not logical. * * * I will give you
enough to be added to that so that you will be able to do that.
* * * I will give you \$250. Would that help you? We have
fully read all of the testimony of Mrs. Bailey as to the
original transcript of the proceedings. Each testimony is so
vague and uncertain that we consider it of no value in determining
the issues. Belknap, as a witness, denied that Mrs. Bailey ever
told him that Mrs. Bailey or any other person would guarantee the
payment of the rent by Mrs. Bailey.

Mrs. Baileg testified that one Brown told her he would
pay \$250 per month as rental for a portion of the garage, and that
she told Belknap over the phone of such offer. Brown testified
he was never an offer of \$250 per month for a part of the garage
and an offer of \$200 per month for the entire garage. Brown
however, never contacted Belknap or any of the officers or agents
of the receiver. Belknap testified he had never heard of Brown
as a possible renter. Baileg, vice-president and cashier of the
receiver, testified that Mrs. Baileg was never indicated to him
that Brown was willing to rent the property. Johnson, the presi-
dent of the receiver, testified that Mrs. Baileg never submitted
the name of any one who was willing to rent the garage. If Brown
seriously considered renting the property he would have submitted
that he did not contact the receiver.

Baileg and Brown, two real estate brokers, were the only
witnesses for the plaintiff who were directly interested in the
rental value of the garage property. Baileg placed it at
\$200 per month, but Brown said he had no opinion as to the rental
value. The president of the Savings Bank testified that before
filing the petition for leave to rent, the bank contacted several

persons in trying to get some one to take a lease, but \$200 per month was the best offer and that he considered \$200 per month a good rental.

The petition of Mrs. Ziegler for the appointment of a receiver was signed and sworn to by her. It was filed fifteen days before the court entered the order authorizing the lease. The record in the present case does not show that such petition of Mrs. Ziegler was ever withdrawn, but so far as the record shows it was still pending at the time the receiver was appointed. Her petition stated that she and Arthur Ziegler were unable to pay their debts and were insolvent. Such petition asked that the court appoint a receiver with power to find tenants and lease the property, etc., but it was not stated in the petition that Mrs. Ziegler or Brown or any other person desired to rent the property. The petition did not ask that any particular person be appointed receiver.

The petition of the receiver for leave to rent stated that Poole occupied a part of the garage property and was paying therefor \$100 per month; that he desired to rent the whole of the property and was willing to pay therefor \$200 per month rent; that Mrs. Ziegler desired to rent the whole of the property and Arthur Ziegler desired to rent the portion of the garage occupied by him, but that the receiver thought both Mrs. Ziegler and Arthur Ziegler were insolvent and unable to furnish security. The order of the court found that \$200 a month was a fair rental, and authorized and directed the receiver to make a lease to Poole. The court was a court of general jurisdiction and, nothing to the contrary appearing, it will be presumed that this order was made upon a proper showing and upon proper notice to all parties interested, including

person in order to get some one to take a letter, and that was
month and the best offer and that he considered \$200 per month a
good rental.

The petition of Mrs. Siegler for the appointment of a
receiver was signed and sworn to by her. It was filed fifteen
days before the court entered the order appointing the receiver.
The record in the present case does not show that such petition
of Mrs. Siegler was ever withdrawn, but as far as the record shows
it was still pending at the time the receiver was appointed. The
petition stated that she and Arthur Siegler were unable to pay
their debts and were insolvent. Such petition would entitle the
court to appoint a receiver with power to find tenants and lease the
property, etc., but it was not stated in the petition that Mrs.
Siegler or from or any other person desired to rent the property.
The petition did not ask that any particular person be appointed
receiver.

The petition of the receiver for leave to sell the
that Poola occupied a part of the garage property and the motion
therefor \$100 per month: that he desired to rent the whole of the
property and was willing to pay therefor \$100 per month rent;
that Mrs. Siegler desired to rent the whole of the property and
Arthur Siegler desired to rent the portion of the garage occupied
by him, but that the receiver thought from Mrs. Siegler and Arthur
Siegler were insolvent and unable to furnish security. The order
of the court found that \$200 a month was a fair rental, and authorized
and directed the receiver to lease a house to Poola. The court was
a court of general jurisdiction and, according to the country ap-
pointed, it will be presumed that this order was made with a proper
showing and upon proper notice to all parties interested.

~~Mrs. Ziegler.~~ (Igglehart v. Pitcher, 17 Ill. 303⁷; C. R. I & P. Ry. Co. v. Town of Calumet, 151 Ill. 512.) It does not appear nor is it claimed that Mrs. Ziegler or any other person objected to the entry of such order or ever moved to vacate it.

It is to be noted that the lease from the receiver to Poole covered only the unexpired period of redemption, and that if redemption had been made the lease would have expired forthwith.

In our opinion the proofs do not sustain the charge that the receiver and Bellatti, or either of them, leased the premises at a rental below the real rental value.

Plaintiffs contend that the defendants, in carrying out their alleged plan to damage the property and thereby depreciate the value, and so prevent redemption, caused or permitted waste on the property in that a partition wall in the garage was removed at about the time the receiver ~~leased~~ ^{leased} the property to Poole. In our opinion the clear weight of the evidence shows that such partition wall was not removed until after the master's deed was delivered to the Perbix'.

We have carefully examined the evidence and are of the opinion that the evidence does not show or even tend to show that any one entitled to redeem was prevented by any misconduct of any of the defendants from obtaining any loan whatever, either from the Reconstruction Finance Corporation or any other person. This claim of the plaintiffs is supported solely by the testimony of Mrs. Ziegler. Her testimony on the subject was at most a mere conclusion based on incompetent hearsay testimony, which testimony was admitted subject to objection.

Ex. Co. v. Tom of Calicut, 151 Ill. 512. It is not proper

nor is it claimed that Mrs. Miller or any other person objected to the entry of such order or ever moved to vacate it.

It is to be noted that the lease from the receiver to Poole covered only the unexpired period of redemption, and that if redemption had been made the lease would have expired forthwith.

In view of the fact that the receiver and Delist, or either of them, issued the leases at a rental below the real rental value.

Plaintiff's contention that the defendant, in carrying out their alleged plan to damage the property and thereby depreciate the value, and so prevent redemption, caused or permitted waste on the property in such a manner as to prevent the receiver from removing the same, and that the receiver issued the property to Poole. In our opinion the clear weight of the evidence favors the fact that the partition will not be removed until after the estate's debt has been delivered to the plaintiff.

We have carefully examined the evidence and are of the opinion that the evidence does not show or even tend to show that any one entitled to raise was prevented by any act or omission of the defendant from obtaining any loan or cover, either from the Reconstruction Finance Corporation or any other person. This claim of the plaintiff is supported solely by the testimony of Mrs. Miller. Her testimony on the subject was not only a mere conclusion based on incompetent hearsay testimony, which testimony was admitted subject to objection.

We consider it immaterial whether Mr. and Mrs. Perbix purchased the certificate of sale for themselves or for others. However, the proofs show the deed was issued to them and that they still own the property, except for a very small piece which they have sold. There is no showing that they did not purchase the certificate of sale for themselves. We also consider it immaterial that Mr. Perbix or Mrs. Perbix may have refused to sell the certificate of sale. This they had the right to do. There is no proof whatever in the record to support the charge that Mr. Perbix stated he would not permit Charles H. Padgett ^{or Lillian Padgett} to redeem.

Mrs. Padgett testified that on the last day of the fifteen month period of redemption she went with her attorney, one Zachary, to the office of the sheriff to make a redemption; that the sheriff then said he was advised not to take the money, but that he didn't say who advised him; that one Applebee, an officer of a loan association, was with her and had a check for \$12,000, but Applebee said he would have to see Mr. Barnes, who was attorney for the loan association, before he could do anything. Mrs. Ziegler admitted that on this occasion no execution had been delivered to the sheriff's office. She further admitted that later in the day Barnes 'phoned her that the loan association would not make the loan. She further testified that later in the day and at about 4:55 P. M. her attorney Zachary got out an execution, but that she never gave her attorney any money with which to redeem. Zachary testified that he took out executions and placed them in the hands of the sheriff about five o'clock P. M. on the last day of the period of redemption, so that redemption could be made if the money could be had, but that the money was not forthcoming.

He considered it impossible that Mr. and Mrs. Perbix
purchased the certificate of sale for themselves or for others.
However, the proofs show the deed was issued to them and that they
still own the property, except for a very small share which they
have sold. There is no showing that they did not purchase the
certificate of sale for themselves. He also considered it im-
probable that Mr. Perbix or Mrs. Perbix may have refused to sell the cer-
tificate of sale. This they had no right to do. There is no proof
elsewhere in the record to support the claim that Mr. Perbix stated
he would not sell Charles H. Babbitt's interest.
Mr. Perbix testified that on the last day of the fifteen
month period of redemption the court with two attorneys, one for each
to the office of the sheriff to make a representation that the sheriff
then said he was advised not to take the money, but that he didn't
say who advised him; that one applied, an officer of a loan as-
sociation, was with him and had a check for \$15,000, but applied
said he would have to see Mr. Babbitt, who was attorney for the loan
association, before he could do anything. Mr. Perbix testified
that on this occasion no execution had been delivered to the sheriff's
office. The further advised that later in the day James' brother
then that the loan association would not make the loan. The further
testified that later in the day and at about 4:30 P. M. her attorney
thereby got out an execution, but that she never gave her attorney
any money with which to redeem. Babbitt testified that he took
one execution and placed them in the hands of the sheriff about
five o'clock P. M. on the last day of the period of redemption, so
that redemption could be made if the money could be had, but that
the money was not forthcoming.

It is our opinion that the proofs did not establish any of the charges alleged in the complaint, and that the trial court properly entered the decree dismissing the complaint for want of equity.

The decree of the circuit court is affirmed.

Affirmed.

It is our opinion that the facts did not establish
any of the charges alleged in the complaint, and that the trial
court properly entered the decree dismissing the complaint for
want of equity.

The decree of the circuit court is affirmed.

Affirmed.

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General number 9366.

Agenda number 11.

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

FEBRUARY TERM, A.D. 1943

313 I.A. 288²

OLLIE E. GOODMAN,

Plaintiff-Appellee,

-vs-

TRI-STATE MUTUAL LIFE
ASSOCIATION,

Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT

of McDonough County.

HONORABLE RILEY E. STEVENS,
Judge presiding.

HAYES, J.:

Ollie E. Goodman, plaintiff-appellee, hereinafter called plaintiff, recovered a judgment in the sum of \$1,098.32 against the Tri-State Mutual Life Association, defendant-appellant, hereinafter called defendant, in the Circuit Court of McDonough County.

The complaint filed herein alleged that on April 11, 1928, defendant issued a benefit certificate to Will T. Goodman in which his wife, the plaintiff, was made sole beneficiary. This certificate provided that on his death, while in good standing, a sum produced by an assessment not to exceed one thousand dollars would be paid to his beneficiary; that after two years the certificate of membership would be incontestable for any cause except violation of the Constitution and laws of the Association, or failure to pay the assessments and dues, and that said certificate on its face showed the rate to be one dollar. Will T. Goodman died on November 15, 1938.

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The complaint further alleges that the insured, during his lifetime subsequent to the issuance of the certificate and until his death, kept, performed and complied with all the terms, provisions and conditions of said certificate and the provisions of the constitution and by-laws of the defendant, and that since the death of the insured the plaintiff had complied with all requirements to be kept and performed by her. It is averred that the defendant is liable to the plaintiff in the sum of one thousand dollars with interest at the rate of five percent per annum from the date of furnishing the proofs of death to the defendant.

The defendant association by its answer admits all the allegations of the complaint except that it denies the insured complied with all the terms, provisions and conditions of said certificate as required by the constitution and by-laws of the Association, and particularly sets out as a basis for this denial that prior to March 2, 1938, the mode of carrying on its insurance business was under the assessment plan. It further states that the constitution and by-laws of the defendant were amended on March 2, 1938 at a regular meeting of the Supreme Union of the Association which eliminated the assessment plan and adopted a plan which called for the establishment of a legal reserve, under the insurance code of the State of Illinois. Defendant further alleges that the insured did not exchange his certificate for a policy under the new system; that on March 2, 1938 he was a member in good standing; that between March 2, 1938 and May 31, 1938 the local secretary gave the insured written notice of the change, a copy of said notice being attached to the answer and identified as Exhibit 8; that the defendant association published an official organ known as the Tri-State News, each month during the year

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1938, which was mailed to Will T. Goodman each month; that said paper contained a notice to members which notice is set out in haec verba in said answer and describes four different kinds of policies in general terms. The answer avers that another notice appeared in this paper that the Association was no longer on the assessment plan, and no more notices of assessment would appear; that "those who have not transferred will, to keep their insurance in force, be required to pay the term rate each month until transferred, which rate each secretary has of the members of their local union." The answer further avers that, during the lifetime of the insured, an agent of the insurer called upon the insured personally and informed him of the change in plan of insurance of the Association, the amount of the annual term rate, the amount of per capita tax which was to be paid by insured, the several plans of insurance, and the amounts and premium rates thereof for which he might exchange his Certificate of Membership. Further averment in the answer is that Will T. Goodman neglected to pay the Association any sum either for premiums or per capita tax subsequent to May 1, 1938; that in consequence the membership of the insured lapsed, ceased and determined on and after thirty days from May 1, 1938; that in the July, 1938 issue of the Tri-State News, a notice to members was run stating that, "members who do not become delinquent in their premium payments have the privilege of making a rearrangement to any of the certificates issued by the Association", and then refers to an Ordinary Life Certificate, a 20 Payment Life, a 20 Year Endowment, and a Whole Paid-up Certificate at 60.

Defendant also claims in its answer that the secretary of Oquawka Local Union, between March 2, 1938 and May 31, 1938 gave a written notice to insured, which notice

1938, which was mailed to Bill F. Gordon and wife; that said
letter contained a notice to appear with notice to set out in
said order in said order and determine the liability of said
polices in general terms. The answer was that said order
appeared in this report and the calculation was as follows on
the assessment plan, and on more policies of assessment would
appear; that "Does who have not answered still, to say
that insurance in force, is required to pay the same rate
each month until cancelled, it is not even necessary for
of the members of their local union." The answer was that
were that, during the lifetime of the insured, an error of
the insurer called upon for interest, especially and in some
one of the cases in line of insurance at the assessment,
the record of the annual rate, the record of the annual
tax which was to be paid by insured, was entered into the
insurance, and the records and papers were turned over
which he might exchange the certificate of insurance.
Further statement in the answer is that Bill F. Gordon
refused to pay the assessment and was asked for money
on per capita tax assessment to say it is more than he can
the membership of the insured insured, and was determined on
and after thirty days from May 1, 1938; that on the 21st, 1938
issue of the Fort-St. Louis Post, a notice to appear and for money
that, "insured who do not answer delinquent at their regular
payments have the privilege of making a payment at any
of the regular meetings of the Association," and that
refers to an Ordinance of the Association, a no interest plan,
a no loan agreement, and a whole group of provisions of the
Association also stated in the answer that the
Secretary of Omaha Local Union, William James J. Ford was
on May 21, 1938 gave a written notice to insured, which notice

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recited that only a few of the members had been found who read the article regarding the change from the assessment plan. The notice also stated that the officers found it impossible to operate on the present basis; that they hired an actuary and a lawyer, and have reorganized the society; that they had applied for a reinsurance in a number of other insurance companies; that the society at that time were preparing eight different kinds of certificates; that they had made arrangements to place a thoroughly competent and qualified home office representative in each county, "who will call on you in the near future to explain in detail the adjustments that are being made." "To comply with the new ruling, your rate will now be \$1.01 and to the amount must be added 15 cents each month for per capita, instead of the \$1.25 twice each year as in the past. This rate is not permanent but will hold good until the representative calls on you to explain the adjustments."

Paragraph 7 of defendant's answer denies that plaintiff has complied with all the terms and provisions of this certificate of membership, or the constitution and by-laws. Paragraph 8 denies any liability by reason of the complaint filed by the plaintiff. In paragraph 9, defendant avers that one assessment upon all the members of the Hancock County Grand Union of the Association, if collected, would not produce the sum of one thousand dollars.

Plaintiff files her motion for a judgment on the pleadings and points out that the facts alleged in the answer, together with the exhibits attached thereto, neither state a defense to the cause of action nor set up facts that would warrant a forfeiture of insured's certificate. Plaintiff avers that there is no provision in the certificate for a forfeiture, and in addition points out that had there been

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such a provision the Association waived it by continuing to treat the insured as a member. To defendant's allegation in paragraph 9 that one assessment would not produce one thousand dollars, plaintiff replies that the defendant, by so amending its by-laws and voluntarily abolishing the assessment plan, was estopped to raise the question.

The Trial Court allowed plaintiff's motion for judgment on the pleadings.

An examination of the Certificate of Membership in this case reveals that there is no provision in it for forfeiture. The only language expressed in reference to nonpayment is: "After two years, Certificates of Membership shall be incontestable for any causes except violation of Constitution or Laws of the Association or failure to pay the Assessment and dues." The answer concedes that the insured was a member in good standing on March 2, 1938. The answer is silent on whether or not the insured paid his dues between March 2, 1938 and May 1, 1938. Defendant merely avers that insured neglected to pay any sum subsequent to May 1, 1938. The complaint alleges that all the payments were promptly made from the issuance of the Certificate up until the date of insured's death. The defendant saw fit to deny this only as to the payments made subsequent to May 1, 1938, so that it can be assumed that all payments were met by the insured in apt time up to May 1, 1938. Where pleading is ambiguous or uncertain that construction will be adopted less favorable to the pleader.

Up until the time the insurer changed from the assessment plan to the new plan the insured was charged with and paid \$2.50 per year, per capita tax. This was paid twice a year. It is proper to assume from the language used in the

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Answer that on April 30, 1938 insured paid in advance a six month's per capita tax which would pay him to the first day of November, 1938, or fifteen days before his death. The answer concedes that thirty days has to expire, after a payment becomes due, before the member is not in good standing. Under the pleadings it appears that there was no default insofar as the per capita tax and dues were concerned.

The only other requirement in the contract on the question of payment is as to assessments. During the ten years that the insured belonged to this Association he regularly paid the assessments as made, at the rate of one dollar per assessment. The answer states that the assessments were eliminated after May 1, 1938, and that no more assessments were made or would be made, so it follows that there was no default on the part of the insured in failing to pay an assessment after and subsequent to May 1, 1938. There is no provision in the contract to declare a forfeiture for the failure to pay an insurance premium, based on a monthly or yearly rate.

Under the pleadings in this case there is clearly, no foundation to declare a forfeiture of insured's certificate of membership. Forfeiture of insurance policies are not favored and will not be upheld in contracts of insurance, if by reasonable construction such result can be avoided. Where the words in the contract of an insurance are susceptible to two interpretations, that interpretation which will sustain the claim must be given preference. A clause in a contract of insurance providing for forfeiture will not be aided by judicial construction. *Bolton v. Standard Life Insurance Company*, 219 Ill App. 177; *Baxter v. Metropolitan Life Ins. Co.*, 318 Ill. 369; *Conductors' Benefit Association v. Tucker*,

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157 Ill. 194. Contracts for insurance of mutual benefit associations, like all other insurance contracts, are construed in favor of the insured and beneficiaries and against the company, where there is any doubt in the language. If the language selected by the insurer is subject to two constructions, that most favorable to insured must be adopted. ^{Ill.} Stone v. Tri-State Mutual Life Assoc., 311 App. 624; Terwilliger v. National Masonic Accident Ass'n., 197 Ill. 9.

The defendant had a right to amend and change its constitution and by-laws even though in doing so the insured's payments were increased, so long as said alteration and changes were not arbitrary and unreasonable. The insurer had no vested right in the permanency of the constitution and by-laws, or in his rate, or plan of insurance but was bound by amendments made from time to time in the mode and manner prescribed by the constitution of the Association and the State Statutes. Jenkins v. Talbot, 338 Ill. 441. ✓

The amendment to the constitution and by-laws made March 2, 1938 appear to be reasonable and for the good of the Association, as it made defendant's plan of insurance conform to the Illinois Insurance Code. Prior to said amendment, defendant operated its insurance business on a post-mortem assessment plan. Articles of Association prior to March 1, 1938 did not require members to pay any premiums for insurance. The constitution and by-laws as amended March 2, 1938 changed the plan of defendant's insurance to a level, legal, reserve basis. Paragraph 4 of the Articles of Association was amended to show that the purpose of the Association was to create a mortuary fund from which death benefits were to be paid. It follows that a mortuary fund cannot be created unless the

THE ILLINOIS LABORERS' UNION, INC. (hereinafter referred to as the "Union"), a corporation organized under the laws of the State of Illinois, and having its principal office at Chicago, Illinois, and branches in various parts of the State of Illinois, do hereby certify that the following is a true and correct copy of the constitution and by-laws of the Union, as the same have been amended from time to time, and as the same are now in force and effect.

ARTICLE I. NAME. The name of the Union shall be the "Illinois Laborers' Union, Inc." and its principal office shall be at Chicago, Illinois, and it shall have branches in various parts of the State of Illinois.

ARTICLE II. PURPOSE. The purpose of the Union shall be to organize and represent laborers in the State of Illinois, and to secure for them the best possible conditions of work, and to protect them from any unfair or unjust treatment by their employers.

8.

members of the Association made regular payments into the fund. The insured was bound by the provisions of the amended constitution and by-laws to make these payments but the Association was likewise required to give reasonable notice in definite language of the amount of the payment of the insured and the time such payment should be made. There is no allegation in the answer that a valid premium or assessment for a definite and stipulated amount was due on the first day of May, 1938 and payable thirty days thereafter.

Section 60 of the Constitution of March 2, 1938 as alleged in paragraph 6 of defendant's answer, provides that from and after the first day of May, 1938, the members shall be required to pay a premium for benefits, "upon the annual renewable term rate based on the American Experience Table of Mortality, with interest at three and one-half percent (3½%) per annum, unless and until the member has transferred his present certificate, or policy of insurance." The by-law fails to provide whether the rate is to be computed on the basis of the age of the insured, at the time of the original certificate, or at the time of the reorganization of the society. Insured's age at the time of joining said Association was forty-nine and on the first day of May, 1938 he had attained the age of fifty-nine. By reference to the above table, it is impossible to reconcile the rate of \$1.01 monthly with interest at three and one-half percent per annum. We passed on section 60 in the case of *Stone v. Tri-State Mutual Life Association*, 311^{Ill.} App. 624, and held the language contained there as to time of payment was indefinite and uncertain. Section 60 attempts to cover the period between the transfer from the old to the new plan and take care of the membership in the interim, but unfortunately the provision for fixing the

9.

time for premium payments and also the method of ascertaining the amount of payment is confusing and it would take an Actuary to figure the rate. The several notices claimed by insurer to have been given to the insured are also indefinite, uncertain and not understandable to the average layman. The change from the assessment plan to the premium plan necessarily led to confusion as indicated by the several notices above referred to. Under the circumstances as shown by the pleadings it would be very unjust to permit the Association to cancel this policy. On the other hand it is entitled to its premiums.

Where nonpayment of premium does not avoid a policy the insurer is entitled to a credit for the amount of the unpaid premium with interest thereon. Union Trust Company v. Chicago Insurance Company, 267 ^{Ill.} App. 470, but it appears that the Circuit Court allowed a deduction for this in the calculation of interest. Taking the monthly premium asked by the local secretary in her notice of \$1.01 per month, for the period from May to November, both inclusive, being seven months, it would amount to \$7.07. A sum in excess of this amount was deducted from the accrued interest.

Under the old plan, a provision existed for the excess over a death claim on an assessment to be kept in a benefit fund, and used only to pay a death claim of a member. The answer failed to deny that there was one thousand dollars on hand in this fund at the time of Goodman's death, so that the defendant cannot contend that the assessment of all the members would not produce as much as one thousand dollars. Although the insured agreed to be bound by the constitution and by-laws of the society that might thereafter be enacted, and although subsequent amendment changed the plan of insurance as herein stated, the society is estopped to plead

the for premium payment not also the method of assessment
 the amount of payment is calculated and it shall be the duty
 to figure the rate. The several parties of interest in
 have been given to the several and the legislative, executive
 and not attributable to the several interest. The several
 from the assessment paid to the several and the several
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where management of several cases but would a ruling
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 interest is several interest. The several interest is several interest

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any resulting disability to levy an assessment which will produce the face amount of the certificate, for this would have a fraudulent effect and permit the society to take a position inconsistent with its acts in adopting the change. Bondy v. Samuels, 333 Ill. 535.

Defendants assign error on account of the Court including interest in the judgment. In the case of the Grand Lodge B. of L. F. v. Orrell, 206 Ill. 208, on a similar certificate of membership it was held that the sum became due when the contingency of its payment accrued and the requirements of the by-laws as to the presentation of the claim had been complied with and payment refused. Interest was properly allowed from the date of such refusal.

Complaint is made that the judgment rendered is void for the reason that the plaintiff's name was not included in the judgment nor the defendant's. The language used being, "Judgment that plaintiff have and recover of the defendant judgment for the sum of one thousand ninety eight dollars and thirty-two cents (\$1,098.32) and costs." The proper practice is that the plaintiff's name should be used as well as defendants. In this case there was only one plaintiff and one defendant and from the caption and pleadings it can be readily ascertained the name of the plaintiff and the name of the defendant, and this is sufficient to make it a valid judgment. American Jur., Vol. 30, 829 sec. 22.

We are of the opinion that the Trial Court properly gave judgment on the pleadings and held there was no forfeiture under the facts as shown on the face of the pleadings; that interest was properly allowed, and that the judgment of the Circuit Court of McDonough County was properly entered. Therefore judgment is affirmed.

JUDGMENT AFFIRMED.

any existing liability to pay an amount which will
exceed the face amount of the certificate, and that there
have been no assignments of the certificate to date.
Question answered with the word in question for answer.
Answer: Yes, Sir.

Question: Answered with the word in question for answer.
Answer: Yes, Sir.

Question: Answered with the word in question for answer.
Answer: Yes, Sir.

Question: Answered with the word in question for answer.
Answer: Yes, Sir.

General number 9369.

Agenda number 14.

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

FEBRUARY TERM, A.D. 1943.

318 I.A. 389

MARSHALL FERGUSON,

Plaintiff-Appellee,

-vs-

THE CHICAGO & EASTERN

ILLINOIS RAILROAD

COMPANY, a Corporation.

Defendant-Appellant:

HAYES, J.:

APPEAL FROM THE CIRCUIT COURT

OF VERMILION COUNTY.

HONORABLE SEN. F. ANDERSON,

Judge Presiding.

This is an appeal by appellant from a judgment entered against it for five thousand dollars upon the verdict of a jury for personal injuries suffered by the plaintiff arising out of an accident which occurred on January 25, 1940 at a highway crossing of the Chicago & Eastern Illinois Railroad Company at a point located one mile south of a small community known as Reilly in Vermilion County, Illinois.

The amended complaint in seven counts charged that the defendant permitted its crossing to be in a dangerous condition; that it allowed weeds to grow six feet high of great density on its right of way near said crossing so that plaintiff's view was obstructed; that it maintained the approach to its track on said crossing at a grade in excess of five percent in violation of the statute; that it operated its train at a dangerous rate of speed, to-wit ninety miles per hour; that its track intersected the highway in question at an angle of 68 degrees, running in a northeast-southwesterly direction;

James Taylor, Jr.

1945-1946

1902, C. A. HOLT YOUNG.

88-41613

- 5 -

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U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Defendant - Appellant:

1. 7. 2014

THE UNIVERSITY OF CHICAGO
 DIVISION OF THE PHYSICAL SCIENCES
 DEPARTMENT OF CHEMISTRY
 5708 S. UNIVERSITY AVENUE
 CHICAGO, ILLINOIS 60637
 TEL: 773-936-5000
 FAX: 773-936-5000

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the investigation. The investigator should identify the problem and the scope of the investigation. The next step is to collect data. This is done by the investigator who is responsible for the investigation. The investigator should collect data from the sources that are available. The next step is to analyze the data. This is done by the investigator who is responsible for the investigation. The investigator should analyze the data and identify the causes of the problem. The next step is to develop a solution. This is done by the investigator who is responsible for the investigation. The investigator should develop a solution that addresses the causes of the problem. The next step is to implement the solution. This is done by the investigator who is responsible for the investigation. The investigator should implement the solution and monitor the results. The final step is to evaluate the results. This is done by the investigator who is responsible for the investigation. The investigator should evaluate the results and determine if the solution was effective.

2.

that it failed to ring a bell or sound a whistle for a distance of at least 80 rods from the crossing, and that by reason of the obstruction of the view, the plaintiff in approaching said crossing from the east in a truck and while in the exercise of due care and caution for his own safety was struck and injured.

Plaintiff's evidence tends to show that the plaintiff approached the crossing in question from the east at about two o'clock on the afternoon of January 25, 1940; that he was driving a 1933 Chevrolet Panel truck which he used for delivering bread on his route through the country; that he had been passing this crossing every other day for four years; that it was not a bright day, the wind was blowing from the northwest, and there was a little snow on the ground; that the road east of the crossing was rough; that he traveled portion of the road and the planked crossing was twelve feet wide; that the level of the highway east of the right of way on this road is lower, about one foot, than the ground at the fence line on the north side of the road; that he was driving at the rate of about 15 miles an hour; that he sat in the cab, which was enclosed, and that the window on his right-hand side was up and the window on his left side was partly opened; that the truck was in good mechanical condition; that there were dormant weeds on the right of way east of the tracks five to six feet tall and two to six inches apart; that said weeds filled in all the right of way from the fence line to within a few feet of the track north of the highway and extended several hundred feet north except for a small triangular piece adjacent to the crossing; that plaintiff stopped his truck east of the track, put it out of gear, put his foot on the brake, looked north, then south and then north again; that his vision at this point was limited to two hundred feet up the track; that he did not hear any

and interest.

[illegible]

3.

bell or whistle; that he proceeded to cross the track where he was struck by the locomotive; that his hearing and eyesight are good; that he was thirty years of age; that there is a light cut 650 feet, and a deep cut 1750 feet northeast of the crossing where the railroad tracks run through; that three different farmers living within one-half to three-fourths of a mile of the crossing had seen the train when it passed on the afternoon in question and testified that they did not hear the bell or whistle, and that the grade of the approach within the right-of-way on the east side of the track is a ten percent grade.

Defendant's evidence tends to show that the bell was kept ringing for more than a mile before it reached the crossing, and that the whistle was blown 80 rods north of the crossing. Neither engineer or fireman saw the plaintiff's truck until the collision. Photographs were taken the day following the collision. The section foreman stated that the cut in question is only seven feet at its deepest point. A photograph marked defendant's exhibit 1 was taken 150 feet east of the track looking west. Defendant's exhibit 2 is a panorama view of the scene of this crossing swinging from the southwest to the west and northwest. The camera was 250 feet east of the center of the railroad track. In defendant's exhibit 3 the camera was in the center of the road 50 feet east of the track, looking northwest. In defendant's exhibit 6 the camera was 150 feet east of the crossing on the highway looking northwest. Defendant's exhibit 7 was taken from a point 120 feet south of the highway crossing looking north. Defendant's exhibit 8 was taken 100 feet east of the crossing on the highway and is a picture of the same train on its run the following day. Defendant's exhibit 9 was taken from the center of the

4.

railroad track 234 feet north of the crossing looking south.

If these photographs introduced by the defendant show the correct situation at the time of the accident it is apparent to anyone that the plaintiff had a fairly unobstructed view of the track for several hundred feet northeast of the crossing, and had he looked he couldn't help but see the train before he went over the tracks. Plaintiff denies that the photographs show the condition of the crossing as it was at the time of the collision and points out the testimony of witness Stuebe, who was at the crossing on Friday morning following the accident on Thursday, who stated that the weeds were higher than his head on the east side of the right of way and that they came close to the crossing in question; that he returned on Saturday morning about ten o'clock with James Feggett, father of the plaintiff, and that these weeds had been cut back three or four hundred feet down the right-of-way; that he and Feggett gathered some of them up and tied a rope around them and identified them as Plaintiff's Exhibit 2.

It further appears that at the time of the accident the section boss with three of his men were working a quarter of a mile south on this right of way cutting weeds, and they were coming north. The Section Boss testified to the custom of cutting weeds along the right of way in the summer and winter and stated that, "we mow the road crossings in the summer time, that is all." He further said that the weeds were let go until winter. He and his three men all testified that they had not cut any weeds on the east side of the right of way north of the crossing up until the afternoon following the accident which would make it up to the time the pictures were taken. The jury may have discovered that the rail motor truck which this section crew used to go back and

believed that the fact that it was a very young man.

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forth to their work appears in some of the pictures taken Friday afternoon by the defendant at a point standing west of the track on the right of way, a considerable distance north of the crossing, and from this concluded that the weeds on the east side of the highway had been mowed to that point prior to the taking of the pictures. The pictures do not show any weeds of the type and character of those brought into court by the plaintiff and introduced in evidence as plaintiff's exhibit 2, which were of a height that would obstruct plaintiff's view in approaching said crossing.

For a railroad company to permit weeds to grow upon its right of way to such a height as to materially obstruct the view is negligence. *Emge v. Ill. Cent. R. R. Co.*, 297^{Ill.} App. 344; *Bartholf v. Wabash, Chester & Western R.R. Co.*, 165^{Ill.} App. 481; *Ind. & St. Louis R.R. Co., v. Smith*, 78 Ill. 112; *Dimick, Admr., v. C. & N.W. Ry. Co.*, 80 Ill. 338.

Chapter 114, section 62 of^{Ill.} Rev. Stats., Bar Ed., states that: "Hereafter, at all of the railroad crossings of highways and streets in this state, the several railroad corporations in this state shall construct and maintain said crossings, and the approaches thereto, within their respective rights of way, so that at all times they shall be safe as to persons and property." Chapter 111 2/3, section 62, paragraph 4, provides that unless otherwise ordered by the commission every railroad company shall maintain the approaches to a highway grade crossing, "at a grade of not more than five (5) percent within the right of way for a distance of not less than twenty-five (25) feet on each side of such tracks."

In analyzing the question of whether or not the plaintiff was guilty of such contributory negligence as

6.

would bar recovery in this case it must be taken into consideration that when he stopped ten feet east of the east rail he was on a slope in excess of what was provided by the law of Illinois. To stop in that position and not go backwards requires the application of the brake and the taking out of the clutch. A train moving at seventy miles an hour will cover 103 feet per second, and if the weeds on each side of the right of way were of the height and density of plaintiff's evidence, his line of vision would not be over six or seven hundred feet. From the time the train came out of the cut until it reached the crossing would not be over seven or eight seconds. For the plaintiff to release his brake, put in his clutch, watch for traffic from the opposite direction on the highway, and steer his car so as to stay on the planks over the crossing required a high degree of diligence in this short interval of time. Having once moved forward on the upgrade of this approach, the plaintiff would soon enter the zone of where he was apt to be struck by a passing train, and under the circumstances shown in this record and the conflict in testimony, we cannot as a matter of law hold that there was such a want of care on the part of the plaintiff as to bar recovery. *Blumb v. Getz*, 366 Ill. 273; *Emge V. Ill. Central R.R. Co.*, supra.

On the question of whether the signal was given, defendant points out that the four witnesses for the plaintiff gave negative testimony, while the engineer and fireman's testimony was positive. It is true that the farmers who testified for the plaintiff and who lived in that community were engaged in sawing wood and other farm tasks, and accustomed as they were to having the train pass daily, may not have registered if the signals were given, their mind being on something else, but the plaintiff who came up to the track, stopped, and gave special attention to the question

[illegible]

7.

of an approaching train cannot be said to have given negative testimony when he says that he did not hear the signals. It further appears that the four section men, who were in the employ and control of the defendant, and were at the time of the accident just south of the crossing did not testify on the subject of whether or not the statutory signals were given. There being a conflict of testimony, it is within the province of the jury to determine what the facts are. R., R. I. & St. L. R.R. Co., v. Hillmer, 72 Ill. 235; I.C. R.R. Co., v. Slater, 129 Ill. 91; P., P. & J. R.R.Co., v. Siltman, 88 Ill. 529.

Complaint is made by the defendant on plaintiff's instruction 3 in that it singles out the defendant's witnesses who are all employees of the railroad. Said instruction advised the jury that, "you have the right to take into consideration any interest which said witnesses may feel, growing out of their relation to either of the parties to this suit, as employees or otherwise." The instruction is subject to the criticism made and on another trial should not be given. I. C. R.R. Co., v. Leggett, 69^{Ill.} App. 347; Zapel v. Ennis, 104^{Ill.} App. 175.

not
The question of whether or/there were weeds six feet in height standing on the east side of the right of way and the north side of the highway so as to obstruct plaintiff's view is a decisive one in this case. There is a conflict in the evidence on this question. Stuebe's testimony merely states that the weeds were cut on Saturday morning, while the positive statement of the section crew is that they had not cut them up to the time the defendant's pictures were taken on Friday afternoon. We feel that the unsatisfactory condition of the evidence in this connection together with the manifest weight of the evidence on this point being with the defendant

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warrants the granting of a new trial to it.

For the reasons stated the judgment of the Circuit Court of Vermillion County is reversed and cause remanded.

JUDGMENT REVERSED AND REMANDED.

expresses the opinion of a new trial in it.

For the reasons stated the judgment of the District

Court of Vermont County is reversed and a new trial

ordered. REVEREND JUSTICE

X

670
318 Ill. App.
adv. pt. 4
Abstract 43 (part 1)
6-1-43

GEN. NO. 9699

AGENDA NO. 21

3181.A. 635

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A.D. 1943

(Circuit 43)
4-7-43

IN THE MATTER OF THE ESTATE)
OF JOSEPH KOS, JR., DECEASED.)
-----)

LORRAINE KOS, ADMINISTRATRIX)
OF THE ESTATE OF JOSEPH KOS,)
JR., DECEASED,)

APPELLANT,)

vs.)

JOSEPH KOS, SR.,)

APPELLEE.)

1027
6274
: APPEAL FROM THE CIRCUIT
COURT OF WILL COUNTY.

HUFFMAN, P. J.

Appellee was the owner of a two story store building. His son, the deceased, ran a grocery store and meat market on the first floor, and together with his wife, resided in a six room apartment on the second floor. After the son's death, the father filed a claim against his estate for store rent in the sum of \$2670, and rent on the apartment in the sum of \$324. A credit of \$90, was listed against the store rent, which reduced it to a net amount of \$2580. This sum,

31217.635

GEN. 10. 8000

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FEBRUARY TERM, A.D. 1925

IN THE MATTER OF THE ESTATE
OF JOSEPH KOS, JR., DECEASED.

FORNIA KOS, ADMINISTRATRIX
OF THE ESTATE OF JOSEPH KOS,
JR., DECEASED,

APPELLANT,

vs.

JOSEPH KOS, SR.,

APPELLEE.

APPEAL FROM THE CIRCUIT
COURT OF WILL COUNTY.

HUSTON, P. 1.

Appellee was the owner of a two story stone build-
ing. His son, the deceased, ran a grocery store and
meat market on the first floor, and together with his
wife, resided in a six room apartment on the second
floor. After the son's death, the father filed a
claim against his estate for store rent in the sum of
\$250, and rent on the apartment in the sum of \$254.
A credit of \$20, was listed against the store rent,
which reduced it to a net amount of \$280. This was

together with the \$324, made a total claim of \$2904, for rent due. The father also made claim in the sum of \$800, for money loaned and advanced his son.

On trial, before jury, in the Circuit Court, a verdict for appellee-claimant was returned for the full amount of the rent claimed, being \$2904. The Administratrix of the debtor's estate, brings this appeal. Three points are argued for reversal. The first is, that the verdict is contrary to the weight of the evidence. The second and third points are directed toward admission of evidence.

From a review of the record, we are not disposed to disturb the judgment. The claim presented a question of fact for the jury. The trial court had the advantage of seeing and hearing the witnesses. We are not of the opinion, he committed error as urged, but on the whole, find that the parties had a full and fair hearing before the jury. Disputed testimony is common to questions of fact in contested matters, but this cannot serve to reverse a judgment where there is sufficient evidence to support the verdict, and no reversible error of law appears.

The judgment is affirmed.

Judgment affirmed.

together with the \$324, made a total claim of \$324, for
rent due. The father also made claim in the sum of \$300,
for money loaned and advanced his son.

On trial, before jury, in the Circuit Court, a ver-
dict for appellee-claimant was returned for the full
amount of the rent claimed, being \$324. The administra-
trix of the decedent's estate, brings this appeal. Three
points are argued for reversal. The first is, that the
verdict is contrary to the weight of the evidence. The
second and third points are directed toward admission of
evidence.

From a review of the record, we are not disposed
to disturb the judgment. The claim presented a question
of fact for the jury. The trial court was the guardian
of seeing and hearing the witnesses. We are not of the
opinion, he committed error as urged, but on the whole,
find that the parties had a full and fair hearing before
the jury. Disputed testimony is covered by questions of
fact in connected matters, and this cannot serve to reverse
a judgment where there is sufficient evidence to support
the verdict, and no reversible error of law appears.

The judgment is affirmed.

Let it be affirmed.

*This opinion
sent as far as the
handwritten is concerned
for Mr. Johnson
4-9-43
new opinion issued.*

Abstract

Gen. No. 9699.

503
Agenda No. 37.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1941.

IN THE MATTER OF THE ESTATE OF
JOSEPH KOS, Jr., Deceased.
Lorraine Kos, Administratrix
of the Estate of Joseph Kos,
Jr., Deceased,

Appellant,

vs.

JOSEPH KOS, Sr.,

Claimant-Appellee.

457
Appeal from
Circuit Court,
Will County.

WOLFE,-- P. J.

This is an appeal from a judgment entered in the Circuit Court of Will County, Illinois, on a verdict rendered in favor of the claimant for \$2,904.00 on a claim filed by Joseph Kos, Sr., against the Estate of Joseph Kos, Jr., deceased. The appellant sets out no errors relied upon for reversal, as required by the rules of this Court and the Supreme Court. In the case of Farmers State Bank of Belvidere, vs. George W. Meyers, 282 Ill. App. at Page 549, we held

APPEAL

27.

0000.

IN THE

A JUDGE OF THE

COURT OF

THE STATE OF

Appeal from
Circuit Court,
Will County,

THE WRITER OF THE PETITION OF
JOSEPH KOS, JR., DECEASED,
ADMINISTRATOR OF THE ESTATE OF
JOSEPH KOS, JR., DECEASED,
DECEASED,

Applicant,

Claimant-A-Respondent.

FILED -- P. 1.

This is an appeal from a judgment entered in the Circuit Court of Will County, Illinois, on a verified petition in favor of the claimant for \$2,004.10 on a claim filed by Joseph Kos, Jr., a first defendant of Joseph Kos, Jr., deceased. The appellant sets out no more relied upon for reversal, as required by the rules of this court and the Supreme Court. In the case of Federal State Bank of Milwaukee, vs. George E. Meyers, 225 Ill. App. 2d 540, we held

2.

that where the appellant fails to set out in his brief the errors relied upon for reversal, as required by the rules of this Court, that then there was nothing presented to this Court for review, and the appeal should be dismissed. (Material Service Corporation vs. Ford 341 Ill., Page 80; Gyure vs. Sloan Valve Company 367 Ill., Page 489.) What we said in regard to the necessity of setting out the errors relied upon for reversal in Farmers State Bank vs. Meyers, supra, is applicable to the present case. The appeal is therefore dismissed.

Appeal dismissed.

John W. Smith

where the appellant fails to set out the brief and errors
upon the reversal, as required by the rules of this Court,
then there was nothing presented to this Court for review, and
appeal should be dismissed. (Official Review Commission vs.
1341 III., Page 33; State vs. Alton Valve Company 337 Ill., Page
(1) What we said in regard to the necessity of setting out the
errors relied upon for reversal in *Barber State Bank vs. Myers*,
is applicable to the present case. The appeal is therefore
dismissed.

Appeal dismissed.

Wm. W. ...

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1941.

IN THE MATTER OF THE ESTATE OF
JOSEPH KOS, JR., Deceased
(Lorraine Kos, Administratrix
of the Estate of Joseph Kos,
Jr., Deceased,

Appellant,

VS.

JOSEPH KOS, SR.,

Claimant-Appellee.

APPEAL FROM THE
CIRCUIT COURT OF
WILL COUNTY.

DOVE, J. DISSENTS.

All the preliminary steps necessary to perfect an appeal in this case were taken, and the transcript of the record was duly filed in this Court. On July 15, 1941 appellant filed herein her abstract, and on September 18, 1941, her brief and argument. Thereafter counsel for appellee filed a brief and argument, and on December 12, 1941 appellant filed her reply brief, and on December 15, 1941 the case was reached on the

IN SENATE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1941.

ATTORNEY GENERAL
OF THE STATE OF ILLINOIS
vs.

THE MATTER OF THE ESTATE OF
JOSEPH KOS, JR., Deceased
vs.
The Estate of Joseph Kos,
Deceased.

Appellant,

vs.

JOSEPH KOS, JR.,

Respondent.

DOV, J. Dissents.

All the preliminary steps necessary to perfect an appeal in this case were taken, and the transcript of the record was duly filed in this court. On July 12, 1941 appellant filed therein her brief, and on September 12, 1941, her brief and argument. Thereafter counsel for appellee filed a brief and argument, and on December 12, 1941 appellant filed her reply brief, and on December 12, 1941 the case was reached on the

call of the docket and submitted on written briefs and arguments, and taken under advisement.

Rule 39 of the Supreme Court provides that appellant shall file a short and clear statement of the case showing, first, the nature of the action; second, the nature of the pleadings sufficiently to show what the issues were, and to present any question subject to review arising on the pleadings; third, in cases depending upon the evidence, the leading facts which the evidence proved or tended to prove, without quotation of evidence, discussion or argument and without detail but with appropriate references to the abstract, and fourth, how the issues were decided upon the trial and what the judgment was. The rule then provides: "The concluding subdivision of the statement of the case shall be a brief statement of the errors or cross errors relied upon for a reversal." An examination of appellant's statement contained in her brief and argument, discloses that this is an appeal from a judgment for \$2904.00 rendered upon a verdict of a jury by the Circuit Court of Will County, upon appeal from the Probate Court of that County, in favor of the claimant, Joseph Kos, Sr., appellee herein, and against Lorraine Kos, Administratrix of the Estate of Joseph Kos, Jr., Deceased, appellant. The claim is for rent of a store building from 1931 to 1938, at Thirty Dollars (\$30.00) per month, and for rent of a flat owned by appellee and occupied by decedent from December 1, 1936 to 1938 at Eighteen Dollars (\$18.00) per month, and for money advanced by claimant to decedent in November 1937. The concluding subdivision of appellant's statement is not a brief statement of the errors relied upon by her for a reversal of this judgment,

all of the books and admitted on written briefs and arguments, and taken under advisement.

Rule 36 of the Supreme Court provides that appellant shall file a short and clear statement of the case showing, first, the nature of the action; second, the nature of the pleadings submitted to show what the issues were, and to present any question subject to review arising on the pleadings; third, in cases depending upon the evidence, the leading facts which the evidence proved or tended to prove, without quotation of evidence, discussion or argument and without detail but with sufficient reference to the subject, and fourth, how the issues were decided upon the trial and what the judgment was. The rule then provides: "The containing subdivision of the statement of the case shall be a brief statement of the errors or omissions relied upon for a reversal." An examination of appellant's statement contained in her brief and argument, discloses that this is an appeal from a judgment for \$304.00 rendered upon a verdict of a jury by the District Court of Hill County, upon appeal from the District Court of that County, in favor of the defendant, Joseph Kos, Jr., appellee herein, and against Lorraine Kos, Administratrix of the Estate of Joseph Kos, Jr., Decedent.

The claim is for rent of a house dating from 1931 to 1932, at \$100.00 per month, and for rent of a lot owned by appellee and occupied by decedent from December 1, 1932 to 1933 at \$15.00 per month, and for money advanced by appellant to decedent in November 1932. The containing subdivision of appellant's statement is not a brief statement of the errors relied upon by her for a reversal of this judgment.

as provided by Rule 39. For that reason alone, this court, of its own motion, has dismissed the appeal and refused to consider the merits of this controversy, and as authority for so doing, relies upon the case of Gyure vs. Sloan Valve Company, 367 Ill. 489, where it is held that the order in which the brief presents the issues is not jurisdictional, that a substantial compliance with this rule is essential, and that when there is no attempt to comply, the appeal will not be entertained.

In the instant case, the first nine pages of appellant's brief and argument are devoted to a statement of the case and the nature of the action, and the facts as disclosed by the evidence. Following this, are three pages under the heading "Points and Authorities" with three subdivisions in large bold-faced type, as follows:

I.

The verdict is contrary to the law and is manifestly against the weight of the evidence.

II.

The Court admitted improper and illegal evidence over the objection of the administratrix-defendant herein and there is no sufficient or substantial evidence to support the verdict of the jury and the verdict is excessive.

III.

The Court erred in refusing to admit proper evidence by the administratrix-defendant herein and informing the jury that it was entirely improper to show the financial ability of Joseph Kos, Jr.

100

Each of the foregoing sub-heads is followed by a concise statement of a proposition of law under which numerous authorities are cited supporting the same. Then follows the argument of ten pages, subdivided as the brief, with the addition of a final paragraph, which is as follows:

" CONCLUSION

Appellant contends that the verdict of the jury was contrary to the law and was manifestly against the weight of the evidence; the court admitted improper and illegal evidence over the objections of the administratrix-defendant herein and there is no sufficient and substantial evidence to support the verdict of the jury and the verdict is excessive and the Court erred in refusing to admit proper evidence offered by the administratrix-defendant herein and in informing the jury that it was entirely improper to show the financial ability to Joseph Kos, Jr. and that on account of the errors relied upon by the defendant, this case should be reversed without remanding."

The brief of appellee seeks to meet the alleged errors relied upon by counsel for appellant for a reversal of this judgment and by the reply brief of appellant which is subdivided as the original brief and argument, counsel endeavors to answer the argument of counsel for appellee and the cases cited and relied upon by appellee are sought to be distinguished. Page 14, the final page of the reply brief is as follows, viz:

" CONCLUSION

Appellant submits that the verdict of the jury was contrary to the law and was manifestly against the weight of the evidence; the Court admitted improper and illegal evidence over the objections of the administratrix-defendant herein and there is no sufficient and substantial evidence to support the verdict of the jury and the Court erred in refusing to

Each of the foregoing paragraphs is followed by a paragraph
statement of a proposition of law which shall contain the
also are cited supporting the same. Then follow the reasons
of law stated, subdivided as the brief, and the citation of a
final paragraph, which is as follows:

CONCLUSION

Applicant contends that the version of the law
was contrary to the law and was manifestly
the result of the evidence; the court should
proper and legal evidence over the objection of the
the administrative board in its favor is no
sufficient and substantial evidence to support the
version of the law and the version is erroneous
and the court should in reaching its decision
evidence contrary to the administrative board's
therein and in support of the law that it was an-
ticipated to be the financial ability to
operate the law and the version of the law
which is the version of the law which is
reversed without remanding.

The court of appeals shall in each case decide
which version of the law is to be applied to the
law and by the court of appeals which is the
version of the original brief and the version
to which the applicant of counsel for applicant has been
added and relies upon by applicant as being the original
page is, the final page of the brief shall be as follows, viz:

CONCLUSION

Applicant contends that the version of the law
contrary to the law and was manifestly
the result of the evidence; the court should
proper and legal evidence over the objection of the
the administrative board in its favor is no
sufficient and substantial evidence to support the
version of the law and the version is erroneous
and the court should in reaching its decision

admit proper evidence offered by the administratrix-defendant herein and in informing the jury that it was entirely improper to show the financial ability of Joseph Kos, Jr., and that the judgment should be reversed.

Respectfully submitted,

RAY F. FAULKNER,

Attorney for Administratrix-
Appellant. "

Gyure v. Sloan Valve Co., supra states that the order in which the brief presents the issues to an appellate court is not jurisdictional, that it is only when there is no attempt to comply with the rules that an appeal will not be entertained, and that the manifest purpose of Rule 39 is to afford courts of review an opportunity to know what they are called upon to determine without being compelled to search the brief and argument in order to determine the issues. From a fair consideration of appellant's brief, this court, in my opinion, is fully advised of the errors upon which appellant relies upon for a reversal of this judgment. Section 4 of the Civil Practice Act provides that that act shall be liberally construed to the end that controversies may be speedily and finally determined according to the substantive rights of the parties. If courts of law are to be sources of justice, the substantive rights of litigants should not be withheld or denied them because of some technical reason and the merits of this appeal should be passed upon by this court.

Appellant's brief in this case more closely follows the rules than the briefs in the recent case of Swain vs. Hoberg, Gen. No. 9707, where a similar order was entered dismissing the appeal from which I dissented. From the order entered herein, I likewise respectfully dissent.

admit proper evidence offered by the administrative-
defendant herein and in testimony that it is
entirely improper to show the financial ability of
Joseph Lee, Jr., and that the judgment should be re-
versed.

Respectfully submitted,

MAY E. FARMER,

Attorney for Administrative-

Appellant.

Grove v. John F. Farmer Co., states that the order in
which the brief presents the issues is an appellate order and not
jurisdictional, that it is only an order and is not subject to
comply with the rule that an appeal will not be sustained, and
that the manifest purpose of this is to afford courts of review
an opportunity to know what they are called upon to determine with-
out being compelled to search the brief and argument in order to
determine the issues. From a fair consideration of appellant's
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rights of the parties. If courts of law are to be sources of
justice, the substantive rights of litigants should not be affected
or denied the process of law and the merits of
this appeal should be passed upon by this court.

Appellant's brief in this case does not follow the rule
than the brief in the recent case of Smith vs. Roberts, 200
2707, where a similar order was entered reversing the appeal
from which I dissented. From the order entered reversing I like-
wise respectfully dissent.

41481

HELEN M. MARSHALL,
Appellant,

NEW AMSTERDAM CASUALTY COMPANY
OF BALTIMORE, a corporation,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

ON REHEARING.

318 I.A. 636

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a petition and rehearing was granted as to that portion of the opinion and order which holds that the trial court properly taxed plaintiff with the costs of depositions taken by defendant.

The principal ground urged for retaxing the costs of the depositions is that the trial court determined the cause on the pleadings and affidavits, and that no use was made of the depositions. We find, however, that in defendant's amendment to the motion to dismiss the complaint, filed June 28, 1939, it offered the depositions of W. R. McFarland and Harley G. Moorhead in support of its motion, and also the affidavit of Roger D. Doten, which was attached to the motion and expressly made a part thereof. From this it will appear that the depositions were actually before the court at the hearing on the motion, and considered by the court in allowing defendant's motion to dismiss.

The depositions in question were taken on stipulation of the parties. At the time they were taken, plaintiff had instituted the suit at bar, her brother had filed another suit in the Circuit court of Cook county, and there was then pending her sister's suit in the United States District court. All three proceedings involved the same issues, and since it was necessary to use the depositions in all the suits, it was agreed that three copies be made of the depositions and that one copy be filed in each of the separate proceedings. The total cost paid by defendant for taking the deposi-

HELEN M. MARSHALL,
Appellant,

NEW AMSTERDAM CASUALTY COMPANY
OF BALTIMORE, a corporation,
Appellee.

COOK COUNTY.

ON REHEARING.

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

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tions for the separate copies thereof was \$478.50, and the Commissioner divided the cost and certified that the defendant had paid one-third of the total cost, or \$159.50, for each copy of the depositions filed. In the United States District court proceeding defendant only recovered, as part of its cost in that suit, \$159.50, and since it prevailed in this proceeding, we perceive no reason why plaintiff should not be taxed with the like sum of \$159.50 for the cost of depositions filed in this suit.

We therefore adhere to the conclusion reached in our original opinion that the judgment of the Superior court should be affirmed. It is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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original opinion that the judgment of the Superior court should be
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JUDGMENT AFFIRMED.

Bullivan, P. J., and Scanlan, J., concur.

41481

HELEN M. MARSHALL,
Appellant,

v.

NEW AMSTERDAM CASUALTY COMPANY
OF BALTIMORE, a corporation,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

318 I.A. 636²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Helen M. Marshall, as legatee under her father's will, brought suit against New Amsterdam Casualty Company of Baltimore, as surety on an administrator's bond, charging waste in the operation of a farm belonging to the estate and other breaches of the bond. Defendant filed a motion and supporting affidavit under section 48 of the Civil Practice Act (ch. 110, Ill. Rev. Stat. 1937) to dismiss the complaint on the ground that the action was barred by prior judgments and that the claim had been released. Plaintiff thereupon filed a counteraffidavit and demand that certain claims of disputed facts involved in defendant's motion be submitted to a jury. The court denied plaintiff's demand, allowed the motion to dismiss, and plaintiff having elected to abide by her complaint, the suit was dismissed, and this appeal by plaintiff followed.

Inasmuch as the cause was determined on pleadings, motions and affidavits, a detailed statement of the various documents involved is necessary to an understanding of the controverted issues. The complaint filed May 28, 1937, alleges that Henry W. Magee died testate August 16, 1931, a resident of Cook county, Illinois, possessed, inter alia, of an 800 acre farm in Douglas county, Nebraska, where ancillary proceedings were instituted in the County court and W. R. McFarland was appointed administrator, with the will annexed, on April 27, 1933; that defendant became surety on the administrator's bond, which was conditioned upon McFarland's making a true and perfect inventory of the goods, chattels, rights and credits of the deceased which should come

HELEN M. MARSHALL,
Appellant,

v.

NEW AMSTERDAM CASUALTY COMPANY
OF BALTIMORE, a corporation,
Appellee.

COOK COUNTY.

APPEAL FROM SUPERIOR COURT.

3181.A.688

MR. JUSTICE FRIND DELIVERED THE OPINION OF THE COURT.

Helen M. Marshall, as legatee under her father's will, brought suit against New Amsterdam Casualty Company of Baltimore, as surety on an administrator's bond, charging waste in the operation of a farm belonging to the estate and other breaches of the bond. Defendant filed a motion and supporting affidavits under section 48 of the Civil Practice Act (ch. 110, Ill. Rev. Stat. 1937) to dismiss the complaint on the ground that the action was barred by prior judgments and that the claim had been released. Plaintiff thereupon filed a counteraffidavit and demand that certain claims of disputed facts involved in defendant's motion be submitted to a jury. The court denied plaintiff's demand, allowed the motion to dismiss, and plaintiff having elected to abide by her complaint, the suit was dismissed, and this appeal by plaintiff followed.

Inasmuch as the cause was determined on pleadings, motions and affidavits, a detailed statement of the various documents involved is necessary to an understanding of the controverted issues. The complaint filed May 26, 1937, alleges that Henry W. Nagge died testate August 16, 1931, a resident of Cook county, Illinois, possessed, inter alia, of an 800 acre farm in Douglas county, Nebraska, where ancillary proceedings were instituted in the County court and W. R. McFarland was appointed administrator, with the will annexed, on April 27, 1932; that defendant became surety on the administrator's bond, which was conditioned upon McFarland's making a true and perfect inventory of the goods, chattels, rights and credits of the deceased which should come

to his knowledge or possession, that he should well and truly administer the same according to law, and out of the proceeds pay all debts and charges, render a true and just account of his acts and doings, and faithfully perform and discharge his duties as such administrator.

The breaches of the bond alleged are (1) that McFarland unlawfully operated the farm "until the filing of his final account in November, 1936," by employing farm labor, cultivating, harvesting and marketing crops, buying feed, caring for and selling live stock and purchasing supplies; (2) that he unlawfully borrowed more than \$5,000 from banks, pledging the credits and assets of the estate as security, and wasted the proceeds in operating the farm; (3) that he unreasonably neglected to pay certain specified claims, with the result that interest in sums aggregating \$1,020.75 accrued thereon; (4) that McFarland, knowing there was insufficient cash in the estate to pay claims, unreasonably delayed selling the assets of the estate until the summer of 1936, so that he and his attorney would profit by prolonging administration; (5) that by reason of this delay in paying allowed fees to attorneys J. L. Kennedy and Fitch and Brown, ^{and} West, interest of \$313.23 and \$132, respectively, accrued on their claims; and (6) that McFarland paid interest on the claim of Wayland Magee, a co-heir and legatee, without order of court.

Defendant's motion to dismiss the complaint under section 48 of the Civil Practice Act alleged (1) that plaintiff failed to obtain permission to sue on the bond, as required by the statutes of Nebraska, and (2) that plaintiff's cause of action is barred by a decree entered in the County court of Douglas, Nebraska, January 14, 1937, approving the final account and report of McFarland as administrator, and an order entered by that court on April 7, 1937, discharging him as such administrator. In support of its motion defendant filed McFarland's affidavit alleging that under the will of Henry W. Magee, his estate was bequeathed to his four children,

to his knowledge or possession, that he should well and truly administer the same according to law, and out of the proceeds pay all debts and charges, render a true and just account of his acts and doings, and faithfully perform and discharge his duties as such administrator.

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Defendant's motion to dismiss the complaint under section 48 of the Civil Practice Act alleged (1) that plaintiff failed to obtain permission to sue on the bond, as required by the statutes of Nebraska, and (2) that plaintiff's cause of action is barred by a decree entered in the County court of Douglas, Nebraska, January 14, 1937, approving the final account and report of McFarland as administrator, and an order entered by that court on April 7, 1937, discharging him as such administrator. In support of its motion defendant filed McFarland's affidavit alleging that under the will of Henry W. Magee, his estate was bequeathed to his four children,

Jerome and Wayland Magee, Louise Augustus, and Helen Marshall, the plaintiff, in equal shares, and that the aforementioned children were parties to the administration proceedings in Douglas county, where affiant, as administrator, filed his final administration account and report in the County court November 19, 1936. The report and account, entitled "FINAL REPORT AND ACCOUNT," is set out verbatim in McFarland's affidavit, and states that it is supplemental to and includes prior reports which the administrator had made to the County court, namely, (1) inventory filed May 31, 1933, and his receipt to the original executors, who were the four children of decedent; (2) first annual report filed May 5, 1934, showing McFarland's administration from April 26, 1933 to April 26, 1934, and containing an itemized account of all receipts and disbursements; (3) special reports of drouth conditions, filed September 10, 1934 and November 1, 1934, showing drouth effect upon the farm; (4) second annual report filed May 16, 1935, covering McFarland's administration to April 26, 1935, showing in detail every transaction in the estate, including sales of live stock, grain transactions, and an itemized account of all receipts and disbursements; and (5) third annual report of McFarland filed May 16, 1936, covering his administration to April 26, 1936, reporting farm yield, sales of live stock, money borrowed from the banks, steps taken to sell real estate, and including an itemized account of all receipts and disbursements. His final report further states that early in 1936 it became apparent that the four heirs could not effect a settlement of their claims or agree upon a division of land and personalty, notwithstanding various efforts to make such settlement in order to avoid delay and cost of selling land, whereupon the administrator then made application to sell real estate, and that the sale was held July 7, 1936, at which Wayland Magee purchased one parcel and the other three children purchased the remainder; that all personal property had been sold, except a few articles, which will be distributed

had been sold, except a few articles, which will be distributed three children purchased the remainder; that all personal property 1936, at which Weyland Magee purchased one parcel and the other application to sell real estate, and that the sale was held July 7, and cost of selling land, whereupon the administrator then made various efforts to make such settlement in order to avoid delay or agree upon a division of land and personally, notwithstanding that the four heirs could not effect a settlement of their claims final report further states that early in 1936 it became apparent including an itemized account of all receipts and disbursements. His money borrowed from the banks, steps taken to sell real estate, and traction to April 26, 1936, reporting farm yield, sales of live stock, annual report of McFarland filed May 16, 1936, covering his administration to April 26, 1936, reporting farm yield, sales of live stock, an itemized account of all receipts and disbursements; and (2) third the estate, including sales of live stock, grain transactions, and traction to April 26, 1936, showing in detail every transaction in second annual report filed May 16, 1936, covering McFarland's administration to April 26, 1936, showing growth effect upon the farm; (4) 1934 and November 1, 1934, showing growth effect upon the farm; (3) special reports of growth conditions, filed September 10, 1934, and containing an itemized account of all receipts and disbursements showing McFarland's administration from April 26, 1933 to April 26, children of decedent; (2) first annual report filed May 7, 1934, 1933, and his receipt to the original executors, who were the four had made to the County court, namely, (1) inventory filed May 31, supplemental to and includes prior reports which the administrator out verbatim in McFarland's affidavit, and states that it is report and account, entitled "FINAL REPORT AND ACCOUNT," is set account and report in the County court November 19, 1936. The where affiant, as administrator, filed his final administration were parties to the administration proceedings in Douglas county, plaintiff, in equal shares, and that the aforementioned children Jerome and Weyland Magee, Louise Augusta, and Helen Bernice, the

to the heirs; that the four executors who administered the estate prior to McFarland's appointment pledged twelve \$1,000 bonds to the First National Bank to secure \$12,500 borrowed by them to operate the farm, and that such bonds were sold in October, 1932, and were not inventoried by McFarland; that copies of the final report and account, and all other reports had been duly sent to each of the four heirs; that August 24, 1931, following the testator's death, Wayland Magee was appointed special administrator on petition showing that he had operated the farm for twenty years preceding; that there was stock of cattle and hogs, that December 1, 1931, on petition signed by all four heirs, regular administration was taken out, and the four heirs were appointed executors, with Wayland Magee selected by all the children, except Jerome, to act as managing executor; that Jerome opposed such selection, and on March 4, 1932, and again March 21, 1933, he petitioned the County court to remove the four executors and appoint him; that the two sisters of Wayland were not in favor of Jerome's acting as managing executor, but all the heirs were in favor of having the farm operated pending payment of debts; that the County court declined to appoint Jerome, and upon the four heirs failing to agree upon their successor, the County court removed them as executors, and April 26, 1933, appointed McFarland administrator, with the will annexed; that the County court allowed \$3,000 to Wayland for services as managing executor, \$2,250 to John L. Kennedy as attorney for Wayland Magee, \$950 to Brown, Fitch and West, and \$100 to Harley G. Moorhead, for attorney's fees incurred while the four children acted as executors; that appeals were taken by Jerome from these allowances, and that Louise Augustus and plaintiff also appealed therefrom, and from the final account of the managing executor; that the District court dismissed the appeals as to the attorneys' fees and reversed the allowance of Wayland's claim; that Wayland thereupon appealed to the Supreme court of Nebraska and in 1935, while the appeal was pending, his claims were compromised at

to the heirs; that the four executors who administered the estate prior to McFarland's appointment pledged twelve \$1,000 bonds to the First National Bank to secure \$12,500 borrowed by them to operate the farm, and that such bonds were sold in October, 1932, and were not inventoried by McFarland; that copies of the final report and account, and all other reports had been duly sent to each of the four heirs; that August 24, 1931, following the testator's death, Wayland Magee was appointed special administrator on petition showing that he had operated the farm for twenty years preceding; that there was stock of cattle and hogs, that December 1, 1931, on petition signed by all four heirs, regular administration was taken out, and the four heirs were appointed executors, with Wayland Magee selected by all the children, except Jerome, to act as managing executor; that Jerome opposed such selection, and on March 4, 1932, and again March 21, 1933, he petitioned the County court to remove the four executors and appoint him; that the two sisters of Wayland were not in favor of Jerome's acting as managing executor, but all the heirs were in favor of having the farm operated pending payment of debts; that the County court declined to appoint Jerome, and upon the four heirs failing to agree upon their successor, the County court removed them as executors, and April 26, 1933, appointed McFarland administrator, with the will annexed; that the County court allowed \$3,000 to Wayland for services as managing executor, \$2,250 to John L. Kennedy as attorney for Wayland Magee, \$950 to Brown, Fitch and West, and \$100 to Harley G. Moorhead, for attorney's fees incurred while the four children acted as executors; that appeals were taken by Jerome from these allowances, and that Louise Hughes and Plaintiff also appealed therefrom, and from the final account of the managing executor; that the District court dismissed the appeals as to the attorneys' fees and reversed the allowance of Wayland's claim; that Wayland thereupon appealed to the Supreme Court of Nebraska and in 1935, the appeal was pending, his claims were compromised at

\$4,300 for money claimed due, and at \$1,000 for his services as managing executor; that thereafter the heirs made numerous attempts to settle all other claims and divide the estate, but without avail; that Harley G. Moorhead had acted as attorney for the administrator, had been paid \$750 and was entitled to an additional allowance for fees; that the administration of the estate had been made unusually difficult by reason of controversies among the four heirs, the criticism to which the administrator had been constantly subjected, the need to have all transactions handled in a most meticulous manner in an attempt to avoid claims of irregularities charged by the heirs; and that the administrator had been paid \$2,400 and was entitled to an additional allowance of fees; that the administrator had \$12,802.77 on hand, which should be used to pay inheritance taxes, costs, fees, and the remainder distributed equally among the four heirs. The final account of the administrator, attached to his final report and set up verbatim in the affidavit supporting defendant's motion, shows in detail all receipts and all disbursements covering the operation of the farm, including receipts from the sales of cattle, hogs, grain and dairy products, from the sale of real estate and personal property, payments for farm labor, and specifically shows payment of each of the bank loans, claims, attorneys' fees and interest items which are alleged by plaintiff to constitute breaches of the bond.

McFarland's supporting affidavit also states that copies of the final account and report were given to plaintiff and the other heirs; that November 19, 1936, an order was entered by the County court setting the hearing on the final account and report for December 14, 1936; that pursuant to continuances of the matter, a hearing was had January 14, 1937, before the judge of the County court, and a final decree was then entered thereon.

The decree is set out verbatim in McFarland's supporting affidavit and is captioned "DECREE ON FINAL ACCOUNT." It states

\$4,300 for money claimed due, and at \$1,000 for his services as managing executor; that thereafter the heirs made numerous attempts to settle all other claims and divide the estate, but without avail; that Harley G. Moorhead had acted as attorney for the administrator, had been paid \$750 and was entitled to an additional allowance for fees; that the administration of the estate had been made unusually difficult by reason of controversies among the four heirs, the claim to which the administrator had been constantly subjected, the need to have all transactions handled in a most meticulous manner in an attempt to avoid claims of irregularities charged by the heirs; and that the administrator had been paid \$2,400 and was entitled to an additional allowance of fees; that the administrator had \$12,002.77 on hand, which should be used to pay inheritance taxes, costs, fees, and the remainder distributed equally among the four heirs. The final account of the administrator, attached to his final report and set up verbatim in the affidavit supporting defendant's motion, shows in detail all receipts and all disbursements covering the operation of the farm, including receipts from the sale of cattle, hogs, grain and dairy products, from the sale of real estate and personal property, payments for farm labor, and specifically shows payment of each of the bank loans, claims, attorneys' fees and interest items which are alleged by plaintiff to constitute breaches of the bond.

McFarland's supporting affidavit also states that copies of the final account and report were given to plaintiff and the other heirs; that November 19, 1936, an order was entered by the County Court setting the hearing on the final account and report for December 14, 1936; that pursuant to continuances of the matter, a hearing was had January 14, 1937, before the Judge of the County Court, and a final decree was then entered thereon.

The decree is set out verbatim in McFarland's supporting affidavit and is captioned "DECREE ON FINAL ACCOUNT." It states

that January 14, 1937, the cause came on to be heard on McFarland's petition as administrator for a final settlement of the estate on the administrator's account; it finds that \$25 of the \$50 due from the State of Nebraska for a condemned Guernsey cow was collected by the administrator and that he paid \$47.54 for personal property taxes assessed against the estate; that the balance of personal property remaining on hand and shown in his final report was sold to Wayland for \$50; that November 19, 1936, the administrator filed his final account and a petition praying that the account be settled and allowed, and that an order was entered on that date setting the time for hearing on the account and requiring that notice thereof be given to all persons interested; that notice of the hearing was duly given to all parties and their attorneys; that the account was in all respects true and correct; that receipts covering each of the expenditures shown in the annual and final reports of the administrator had been filed; that due notice to creditors had been given; that all claims allowed against the estate had been fully paid; that inheritance taxes of \$166.06 had been assessed against the estate; that the estate was devised to Jerome and Wayland Magee, Louise Augustus and plaintiff in equal parts; that \$1,125 should be paid to G. F. Nye for legal services in the District court; that Harley G. Moorhead, attorney for the administrator, had been paid \$750 on account and was entitled to receive the further sum of \$2,250; that the administrator had received \$2,400 and was entitled to a further allowance of \$2,850; that there was due \$131.25 for court costs; and after paying the foregoing items the administrator would have on hand \$6,249.92. The decree allowed, settled and approved the final administration report and account, ordered the administrator to pay costs and to pay \$1,562.48 to each of the four heirs as their respective distributive shares, and provided that upon payments of costs and the foregoing items, and the return of vouchers and report of his doings under the decree and the approval of the same

report of his doing under the decree and the approval of the same of costs and the foregoing items, and the return of vouchers and respective distributive shares, and provided that upon payments costs and to pay \$1,562.48 to each of the four heirs as their administration report and account, ordered the administrator to pay and \$6,249.92. The decree allowed, settled and approved the final after paying the foregoing items the administrator would have an allowance of \$2,850; that there was due \$11.25 for court costs; and the administrator had received \$2,400 and was entitled to a further account and was entitled to receive the further sum of \$2,250; that G. Moorhead, attorney for the administrator, had been paid \$750 on to G. T. Rye for legal services in the District court; that Harley Augustus and plaintiff in equal parts; that \$1,125 should be paid that the estate was devised to Jerome and Weyland Lahee, Louise inheritance taxes of \$166.06 had been assessed against the estate; that all claims allowed against the estate had been fully paid; that the expenditures shown in the annual and final reports of the administrator had been filed; that due notice to creditors had been given; in all respects true and correct; that receipts covering each of duly given to all parties and their attorneys; that the account was be given to all persons interested; that notice of the hearing was time for hearing on the account and requiring that notice thereof and allowed, and that an order was entered on that date setting the his final account and a petition praying that the account be settled to Weyland for \$50; that November 19, 1936, the administrator filed property remaining on hand and shown in his final report was sold taxes assessed against the estate; that the balance of personal the administrator and that he paid \$47.54 for personal property the State of Nebraska for a condemned German cow was collected by the administrator's account; it finds that \$25 of the \$50 due from petition as administrator for a final settlement of the estate on that January 14, 1937, the cause came on to be heard on McFarland's

by the court, the administrator be discharged.

It is further alleged in McFarland's affidavit that this was a final decree, from which an appeal could have been taken under the laws of Nebraska; that it was binding upon plaintiff; that no appeal was taken therefrom; and that the decree had not been vacated or set aside. The affidavit states that March 20, 1937, pursuant to the final decree, the administrator paid plaintiff \$1,562.48 in full and final payment and satisfaction of all claims which she might have against the administrator, and that plaintiff then executed and delivered to him the following document: "RECEIVED of W. R. McFarland, Administrator with Will annexed of the Estate of Henry W. Magee, deceased, the sum of Fifteen Hundred sixty-two and 48/100 (\$1,562.48) Dollars, the same being in full and final settlement with said Administrator, and being in full payment of the amount found to be due me, as one of the four equal heirs under the Will of decedent in said Estate, according to the Decree on Final Account in the above Estate, dated January 14th, 1937; and I hereby release the said Administrator and his bond from further liability in said matter."; and that all claims of plaintiff upon the bond, as alleged in her complaint, were thereby satisfied and released.

The supporting affidavit also alleges that April 7, 1937, the administrator filed in the County court vouchers and receipts showing payment of costs and of \$1,562.48 each to plaintiff and the other three heirs, in accordance with the final decree; that thereupon an order was entered by the County court discharging McFarland as administrator, and that such order of discharge was never vacated or set aside or any appeal taken therefrom.

Plaintiff in her counteraffidavit to defendant's motion to dismiss does not deny that orders were entered or documents filed, as shown in McFarland's supporting affidavit, but she denies that the decree entered January 14, 1937, is a final decree, or that the

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was a final decree, from which an appeal could have been taken under the laws of Nebraska; that it was binding upon plaintiff; that no appeal was taken therefrom; and that the decree had not been vacated or set aside. The affidavit states that March 20, 1937,

pursuant to the final decree, the administrator paid plaintiff \$1,562.48 in full and final payment and satisfaction of all claims which she might have against the administrator, and that plaintiff then executed and delivered to him the following document: "RECEIVED of W. R. McFarland, Administrator with Will annexed of the Estate of Henry W. Magee, deceased, the sum of Fifteen Hundred sixty-two and 48/100 (\$1,562.48) Dollars, the same being in full and final settlement with said Administrator, and being in full payment of the amount found to be due me, as one of the four equal heirs under the Will of decedent in said Estate, according to the Decree on Final Account in the above Estate, dated January 14th, 1937; and I hereby release the said Administrator and his bond from further liability in said matter."; and that all claims of plaintiff upon the bond, as alleged in her complaint, were thereby satisfied and released.

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account and report filed by the administrator is a final account and report; and as to the order of discharge entered April 7, 1937, plaintiff merely states that she has no knowledge thereof and demands strict proof, and that even if any such order was entered, the County court had no jurisdiction to make the order. Her counteraffidavit quotes a portion of the "decree entered by said county court on January 14, 1937," and alleges that a suit was pending in the District court of the United States, Northern District of Illinois, April 7, 1937, entitled Louise M. Augustus v. New Amsterdam Casualty Company of Baltimore, a corporation, case No. 46154, in which the administrator was charged with breaches of the same bond sued on herein, and that if the administrator assumed to make a final settlement of the estate and effect his discharge while such suit was pending, he was guilty of fraud, and such discharge was accordingly void. Plaintiff further alleges, as another reason why the proceedings in the County court could not constitute a final settlement and discharge, that such proceedings were merely ancillary, and that the place for final settlement was in the forum of the original administration in Cook county.

April 20, 1938, plaintiff filed a motion and supporting affidavit to dismiss the affirmative defenses set forth in defendant's answer and on May 14, 1938, filed an amended motion to strike the same defenses, from which it appears that there was no issue of fact as to the entry of the orders by the court in Douglas county, Nebraska, and wherein she denied only the legal effect of the admitted orders.

Defendant's amendment to its motion to dismiss plaintiff's complaint, filed June 28, 1939, set up the additional ground (1) that March 20, 1937, plaintiff released the administrator and his bond from further liability in connection with the estate, and (2) that the alleged cause or causes of action set forth in plaintiff's complaint are barred by judgment entered January 20, 1938, by the United States District court in cause No. 46154 in favor of defend-

account and report filed by the administrator is a final account and report; and as to the order of discharge entered April 7, 1937, Plaintiff merely states that she has no knowledge thereof and demands strict proof, and that even if any such order was entered, the County court had no jurisdiction to make the order. Her counteraffidavit quotes a portion of the "decree entered by said county court on January 14, 1937," and alleges that a suit was pending in the District court of the United States, Northern District of Illinois, April 7, 1937, entitled Louis M. Augustus v. New Amsterdam Casualty Company of Baltimore, a corporation, case No. 46154, in which the administrator was charged with breaches of the same bond sued on herein, and that at the administrator assumed to make a final settlement of the estate and effect his discharge while such suit was pending, he was guilty of fraud, and such discharge was accordingly void. Plaintiff further alleges, as another reason why the proceedings in the County court could not constitute a final settlement and discharge, that such proceedings were merely ancillary, and that the place for final settlement was in the form of the original administration in Cook county.

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ant and against Louise Augustus, which was affirmed by the United States Circuit Court of Appeals for the 7th circuit, whose decision is reported in 100 Fed. (2d) 581, and certiorari was denied by the United States Supreme court May 15, 1939 (307 U. S. 631), and by judgment entered March 16, 1939, in the Circuit court of Cook county, Illinois, in case No. 37-C-5379, in favor of defendant and against Jerome Magee. In support of its motion as amended, defendant offered the depositions of W. R. McFarland and Harley G. Moorhead, filed in this cause January 13, 1938, and the affidavit of Roger D. Doten attached to the amendment to defendant's motion. Doten's affidavit contains a verbatim copy of the order entered April 7, 1937, by the County court of Douglas county, as follows:

"WHEREAS, It appears by the records and proceedings of said court, that you have in all things faithfully and justly performed and discharged all and singular the duties and obligations which by law and the orders of said court were required of and enjoined upon you, and that you have duly and fully accounted for and administered all of said estate which has come into your possession in pursuance of such law.

"THEREFORE, In consideration of the premises, you are hereby discharged, exonerated and acquitted from any and all liabilities and troubles concerning your administration of said estate, and your doings and proceedings are forever quieted in so far as all the matters and things which have come before this court are concerned, and your Letters heretofore granted are hereby revoked."

His affidavit also alleges that Louise Augustus on January 13, 1937, filed a complaint in the Circuit court of Cook county against the surety upon McFarland's bond as administrator, wherein she alleged the same breaches as are charged by plaintiff in this proceeding, and claimed \$10,000 damages, the full penalty of the administrator's bond; that said cause, which was removed to the United States District court, involved the same issues as are involved in this proceeding; that the case was tried by Judge John

and against Louis Augustus, which was affirmed by the United States Circuit Court of Appeals for the 7th circuit, whose decision is reported in 100 Fed. (2d) 581, and certiorari was denied by the United States Supreme Court May 15, 1939 (307 U. S. 631), and by judgment entered March 16, 1939, in the Circuit Court of Cook County, Illinois, in case No. 37-C-5399, in favor of defendant and against Jerome Hayes. In support of its motion as amended, defendant offered the depositions of W. R. McFarland and Harley G. Moorehead, filed in this cause January 13, 1938, and the affidavit of Roger D. Doten attached to the amendment to defendant's motion. Doten's affidavit contains a verbatim copy of the order entered April 7, 1937, by the County Court of Douglas County, as follows: "WHEREAS, It appears by the records and proceedings of said court, that you have in all things faithfully and justly performed and discharged all and singular the duties and obligations which by law and the orders of said court were required of and enjoined upon you, and that you have duly and fully accounted for and administered all of said estate which has come into your possession in pursuance of such law.

"THEREFORE, In consideration of the premises, you are hereby discharged, exonerated and acquitted from any and all liabilities and troubles concerning your administration of said estate and your doings and proceedings are forever deleted in so far as all the matters and things which have come before this court are concerned, and your letters heretofore granted be hereby revoked."

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P. Barnes, and judgment entered January 20, 1938 in favor of defendant and against Louise Augustus; that the latter appealed to the United States Circuit Court of Appeals for the 7th circuit, which affirmed the judgment, as reported in its opinion in 100 Fed (2d) 581; that thereafter Louise Augustus filed a petition for certiorari to the United States Supreme Court, which was denied May 15, 1939 (307 U. S. 631); that plaintiff herein, Helen Marshall, is also one of the heirs of Henry W. Magee, deceased, and is in privity with Louise Augustus; that if she had recovered in said suit against defendant, plaintiff herein would have been entitled to her share of such recovery; and therefore she is bound by the judgment aforesaid. Doten's affidavit further states that Jerome Magee, another heir, filed his complaint in the Circuit court of Cook county, Illinois, against the same defendant upon the same bond, and alleged as breaches thereof the same breaches as are alleged by plaintiff in this suit; that the proceeding instituted by Jerome involved the same issues as are involved in this case; that said cause came on for trial before Judge Chalmers C. Taylor, and defendant was permitted to renew its motion to dismiss the complaint filed by Jerome, and said motion was allowed, and judgment was entered March 16, 1939, in favor of defendant and against Jerome; that no appeal was taken from that judgment; that plaintiff in this cause is in privity with Jerome; and that she is bound by the decision there entered against him. Plaintiff filed no counteraffidavit to the amendment.

As the principal ground for reversal it is urged that defendant's motion and affidavits to dismiss, together with plaintiff's counteraffidavit, involved disputed questions of fact which should have been submitted to a jury, as provided by section 48, paragraph 3 of the Civil Practice Act. Under this section of the statute the court is required to grant a demand for a jury trial only "if disputed questions of fact are involved," and where there are no such questions, submission to a jury is not required. Plaintiff challenges "the

P. Barnes, and judgment entered January 20, 1938 in favor of defendant and against Louise Augustus; that the latter appealed to the United States Circuit Court of Appeals for the 7th circuit, which affirmed the judgment, as reported in its opinion in 100 Fed (2d) 581; that thereafter Louise Augustus filed a petition for certiorari to the United States Supreme Court, which was denied May 15, 1939 (307 U. S. 631); that plaintiff herein, Helen Marshall, is also one of the heirs of Henry W. Magee, deceased, and is in privity with Louise Augustus; that if she had recovered in said suit against defendant, plaintiff herein would have been entitled to her share of such recovery; and therefore she is bound by the judgment aforesaid. Doten's affidavit further states that Jerome Magee, another heir, filed his complaint in the Circuit Court of Cook County, Illinois, against the same defendant upon the same bond, and alleged as breaches thereof the same breaches as are alleged by plaintiff in this suit; that the proceeding instituted by Jerome involved the same issues as are involved in this case; that said case came on for trial before Judge Chalmers C. Taylor, and defendant was permitted to renew its motion to dismiss the complaint filed by Jerome, and said motion was allowed, and judgment was entered March 16, 1939, in favor of defendant and against Jerome; that no appeal was taken from that judgment; that plaintiff in this case is in privity with Jerome; and that she is bound by the decision there entered against him. Plaintiff filed no counteraffidavit to the amendment.

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existence of every fact upon which defendant relied for the dismissal of the action," and argues specifically that there are four disputed questions of fact which required the court to grant a jury trial. She claims that she disputed, first, the existence of (1) the Douglas county court's decree of January 14, 1937, and the order of April 7, 1937, discharging the administrator; (2) the judgment entered January 20, 1938, by the United States District court against Louise Augustus and in favor of defendant; and (3) the judgment entered March 16, 1939, by the Circuit court of Cook county in favor of defendant and against Jerome Magee. We find no effectual denial of any of these facts, either in the complaint or the counteraffidavit filed by plaintiff. With respect to the administrator's final report and account, her complaint specifically alleged that the administrator operated the farm from April 27, 1933, "until the filing of his final account in November, 1936," and her counteraffidavit, while generally denying that a final account and report was filed by the administrator, or a final decree entered, makes no specific denial of the filing of the various reports and the discharge of the administrator, all of which are set forth verbatim in defendant's supporting affidavit. With respect to the order of discharge, her complaint merely alleges that the County court was without jurisdiction to enter the order, and her counteraffidavit merely states that "the matters alleged in plaintiff's complaint were not litigated by plaintiff in said County court on said administrator's account." In her amended motion to strike the affirmative defenses in defendant's answer, plaintiff took the position that the decree of the County court was based on an interlocutory account and was therefore not a final decree nor so recognized by the administrator, because he subsequently, April 7, 1937, secured an order "purporting to discharge him as administrator." We think these circumstances indicate that plaintiff did not dispute and could not well dispute, but rather admitted, the proceedings of the Douglas County court on which defendant relied, and questioned only the legal effect of such

existence of every fact upon which defendant relied for the dismissal of the action," and argues specifically that there are four disputed questions of fact which required the court to grant a jury trial. She claims that she disputed, first, the existence of (1) the Douglas County court's decree of January 14, 1937, and the order of April 7, 1937, discharging the administrator; (2) the judgment entered January 20, 1938, by the United States District court against Louise Augustus and in favor of defendant; and (3) the judgment entered March 16, 1939, by the Circuit court of Cook County in favor of defendant and against Jerome Hayes. We find no effectual denial of any of these facts, either in the complaint or the counteraffidavit filed by plaintiff. With respect to the administrator's final report and account, her complaint specifically alleged that the administrator operated the farm from April 27, 1933, "until the filing of his final account in November, 1936," and her counteraffidavit, while generally denying that a final account and report was filed by the administrator, or a final decree entered, makes no specific denial of the filing of the various reports and the discharge of the administrator, all of which are set forth verbatim in defendant's supporting affidavit. With respect to the order of discharge, her complaint merely alleges that the County court was without jurisdiction to enter the order, and her counteraffidavit merely states that "the matters alleged in plaintiff's complaint were not litigated by plaintiff in said County court on said administrator's account." In her amended motion to strike the affirmative defenses in defendant's answer, plaintiff took the position that the decree of the County court was based on an interlocutory account and was therefore not a final decree nor so recognized by the administrator, because he subsequently, April 7, 1937, secured an order "purporting to discharge him as administrator." We think these circumstances indicate that plaintiff did not dispute and could not well dispute, but rather admitted, the proceedings of the Douglas County court on which defendant relied, and questioned only the legal effect of such

proceedings in the trial court. The affidavits supporting defendant's motion and amended motion elaborately set forth every step of the proceedings had in the county court, together with verbatim copies of the interlocutory and final reports filed, the order discharging the administrator, and the release which plaintiff ultimately gave for her distributive share of the proceeds of the estate, wherein she specifically released the "Administrator and his bond from further liability in said matter." Notice of all proceedings were served upon her. Under the circumstances her denials do not constitute a dispute of issues of fact within the contemplation of section 48.

With respect to the judgments entered against Louise Augustus in the United States District Court and against Jerome Magee in the Circuit court of Cook county, plaintiff takes the position and cites authorities tending to hold that judicial records cannot be "proved" by affidavits. The record shows that these judgments were first pleaded by defendant in bar in the amendment to its motion to dismiss filed June 28, 1939. Plaintiff failed to file any pleading or affidavit to that amendment, and there is nothing of record to show that she took issue thereto. Therefore, all well-pleaded facts with reference to those judgments must be admitted for the purposes of the motion. Brandt v. St. Paul Mercury Indemnity Co., 285 Ill. App. 212. The necessity for proving the judgments never arose, because they were not denied, and the court had before it only a question on the pleadings and the issues raised thereby. Having failed to raise any issue of fact as to those judgments, plaintiff cannot on appeal for the first time contend that defendant is precluded from "proving" the orders and judgments by mere allegations in the affidavits filed in support of its motion to dismiss. Moreover, our attention is called to subparagraph 2 of section 259.13 of the Rules of Practice and Procedure, chapter 110, Ill. Rev. Stat. 1939, which specifically provides that "In

proceedings in the trial court. The affidavits supporting defendant's motion and amended motion elaborately set forth every step of the proceedings had in the county court, together with verification copies of the intermediary and final reports filed, the order discharging the administrator, and the release which plaintiff distributed, giving her her distributive share of the proceeds of the estate, wherein she specifically released the "Administrator and his bond from further liability in said matter." Notice of all proceedings were served upon her. Under the circumstances her denial do not constitute a dispute of issues of fact within the contemplation of section 48.

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pleading a judgment, decree or order of any State or Federal Court or the decision of any State or Federal officer or board of special jurisdiction, it shall be sufficient to state the date of its entry, and describe its general nature and allege generally that the judgment or decision was duly given or made." Defendant's allegations with respect to the foregoing orders and judgments fully comply with that rule. In fact defendant went beyond the requirements of the rule in so far as the proceedings of the Douglas County court are concerned by setting forth the orders and decrees of that court verbatim in order to show that the issues involved were the same as plaintiff now claims to constitute breaches of the bond.

The second fact which plaintiff claims she disputed is whether the matters alleged in her complaint had been litigated by her and adjudicated in the Douglas County court. The detailed recital of the pleadings, motions and affidavits in the forepart of our opinion discloses that plaintiff was a party to the administration proceedings in Nebraska, that the administrator's final account and report showed, and the decree of the county court approved, each and every act of the administrator which plaintiff in her complaint charged as breaches of the bond sued upon. Her counteraffidavit does not deny the filing of the administrator's final account, the entry of the decree thereon, the order discharging the administrator nor any of the facts or findings therein recited, all of which were set forth in full in defendant's motion and supporting affidavit. Plaintiff merely relies on the legal conclusion "that the matters alleged in plaintiff's complaint were not litigated by plaintiff in said county court." We think the trial court was justified in ignoring these legal conclusions and determining for itself, from the uncontroverted facts set forth in the pleadings, whether the acts of the administrator were adjudicated by the Douglas County court. This conclusion is supported in Keefer v. United Elec. Coal Cos., 292 Ill. App. 36.

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Plaintiff next claims she disputed that the issues were the same in the cases in the United States District court and the Circuit court of Cook county, as in the case at bar. We have already pointed out that neither her complaint nor defendant's original motion contained any reference to either of those judgments, which were first pleaded by defendant in the amendment to its motion to dismiss, to which plaintiff filed no pleading or counteraffidavit. That amendment specifically alleged that the suits brought by Louise Augustus and Jerome Magee alleged as breaches of the bond the same breaches as are alleged by plaintiff in this suit, and that such suits involved the same issues as are involved in this proceeding. Obviously plaintiff's jury demand did not raise an issue of fact as to these suits. In this connection defendant's counsel call our attention to the following applicable quotation from Brandt v. St. Paul Mercury Indemnity Co., supra; "Under the Practice Act, chapter 110, par. 176, sec. 48, Ill. State Bar Stats. 1935, where affidavits are made as to certain facts and filed and no contradiction is made thereto, this court will presume that the trial court had sufficient evidence before it to justify its entering the order."

Lastly, plaintiff claims she disputed the receipt of her distributive share in full satisfaction of all demands against the administrator. It is difficult to understand how this contention can be seriously considered in view of the admission that she executed a release to the administrator, which is set forth in the affidavit supporting/acknowledging receipt of \$1,562.48 "in full and final settlement with said Administrator, and *** in full payment of the amount found to be due me, as one of the four equal heirs under the Will of decedent in said Estate, according to the Decree on Final Account ***, dated January 14th, 1937," and wherein she released the administrator and his bond from further liability. McFarland's supporting affidavit stated that the county court's decree of January 14, 1937, determined the cash distributive share of each heir,

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averred that he had paid plaintiff the amount of cash determined by the decree as her share, and that plaintiff had thereupon executed and delivered to him the formal release herein set forth. Since plaintiff's counteraffidavit failed to deny any of these facts the court was obviously warranted in regarding such facts as admitted by plaintiff for all purposes at the hearing on the motion to dismiss, and in deciding the effect of such facts only as a question of law.

From the foregoing considerations we are constrained to hold that since plaintiff either expressly admitted in her complaint or counteraffidavit the facts upon which defendant's motion to dismiss is based, or conceded such facts by failing to take any issue therewith after the same had been alleged in supporting affidavits, the trial court had only legal questions to decide, and therefore was not required to grant plaintiff's demand for a jury trial.

The breaches of the bond charged in the complaint, namely, that the administrator unlawfully operated the farm, borrowed money from the bank without authority in the will, wrongfully delayed the sale of real and personal property, and delayed paying claims and attorneys' fees allowed against the estate, with the result that interest accrued thereon, were all adjudicated in the Douglas county court, where the fact and manner of operating the farm, the receipts, disbursement and borrowing of money, the length of time during which the administration continued, the manner, time and sale of realty and personalty, and the payment of interest on claims and fees, were all in issue upon hearing on the final account and report. The administrator complied with the conditions of the bond. He filed his inventory, administered the estate, paid all debts, and rendered a just and true account of his acts and doings. By its decree on the final account, the court found that due notice of the hearing was had, that the administrator had explicitly followed the instructions of the court, and that the account was true and correct. The court approved the operation of the farm, the borrowing of funds from the bank, the sale of real and personal property, the payment of interest

averred that he had paid plaintiff the amount of cash determined by the decree as her share, and that plaintiff had thereupon executed and delivered to him the formal release herein set forth. Since plaintiff's counterclaim failed to deny any of these facts the court was obviously warranted in regarding such facts as admitted by plaintiff for all purposes at the hearing on the motion to dismiss, and in deciding the effect of such facts only as a question of law.

From the foregoing considerations we are constrained to hold that since plaintiff either expressly admitted in her complaint or counterclaim the facts upon which defendant's motion to dismiss is based, or conceded such facts by failing to take any issue there-with after the same had been alleged in supporting affidavits, the trial court had only legal questions to decide, and therefore was not required to grant plaintiff's demand for a jury trial.

The proceeds of the bond charged in the complaint, namely, that the administrator unlawfully operated the farm, borrowed money from the bank without authority in the will, wrongfully delayed the sale of real and personal property, and delayed paying claims and attorneys' fees allowed against the estate, with the result that interest accrued thereon, were all adjudicated in the Douglas county court, where the fact and manner of operating the farm, the receipts, disbursement and borrowing of money, the length of time during which the administration continued, the manner, time and sale of realty and personally, and the payment of interest on claims and fees, were all in issue upon hearing on the final account and report. The administrator complied with the conditions of the bond. He filed his inventory, administered the estate, paid all debts, and rendered a just and true account of his acts and doings. By its decree on the final account, the court found that due notice of the hearing was had, that the administrator had explicitly followed the instructions of the court, and that the account was true and correct. The court approved the operation of the farm, the borrowing of funds from the bank, the sale of real and personal property, the payment of interest

on the claims, and attorneys' fees mentioned in plaintiff's complaint, determined and directed payment of the amount of the distributive share of each heir, and ratified and confirmed every act which plaintiff alleges as a breach of the bond in this proceeding. Furthermore, by its discharge of the administrator the court found that he had in all things faithfully and justly performed and discharged the duties and obligations which by law and orders of the court were required of and enjoined upon him, and that he had duly and fully accounted for and administered all of the estate which had come into his possession in pursuance of law. By this order he was exonerated and acquitted from any and all liability concerning his administration, and his administration of the estate was fully ratified.

The question is therefore presented whether, after such decree and discharge, his acts can be questioned by collateral attack, as is attempted in this proceeding. It cannot here be contended that the court acted improperly in approving the account and discharging the administrator, since any errors that might have been committed in that behalf could be corrected only by appeal, and not in a collateral proceeding. Putnam v. Citizens' National Trust & Savings Bank etc., 77 Fed. (2d) 58; McDonald v. The People, 222 Ill. 325. It has been held under various Nebraska decisions that as to probate matters, the County court is one of general jurisdiction, and that its judgment upon matters within its jurisdiction cannot be collaterally attacked. Fischer v. Sklenar, 101 Neb. 553, 163 N. W. 861; and the following cases cited therein: Lydick v. Chaney, 64 Neb. 288; Miller v. Estate of Miller, 69 Neb. 441; and In re Estate of Creighton, 91 Neb. 654. Defendant says that in the trial court plaintiff sought to avoid the effect of the County court's final decree and order of discharge on the ground that they were not final and appealable orders, but only interlocutory, and therefore they could not be urged in bar of plaintiff's suit. However, in her brief on appeal she does not argue or question the finality of

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the decree and order, and therefore we must assume that she has waived the point. De Pauw University v. United Elec. Coal Cos., 299 Ill. App. 339. It is true that under the Nebraska decisions, orders of the Probate court adjusting or correcting accounts of an administrator made while he is acting as such, are interlocutory and not final until his discharge as administrator and the approval of his accounts upon discharge, but in this proceeding both the decree on final account and the order of discharge were entered by the Douglas County court, and thereupon became final.

The remaining considerations urged by plaintiff in an effort to avoid the finality of the decree and the order discharging the administrator are threefold. It is first argued that the Probate court had no jurisdiction to adjudicate the liability of an administrator or his surety upon the bond, and therefore the proceedings in the Douglas County court are not res adjudicata of plaintiff's action upon the bond. It may be true that the Douglas County court was a Probate court in which suit upon the bond could not have been brought by plaintiff, but it does not follow that an adjudication by that court of issues which are material in a subsequent suit upon the bond is not an adjudication. Certainly that court had jurisdiction to determine the propriety of the expenditures and acts of the administrator, and its findings in favor of the administrator may be availed of by defendant, as surety, when the same issues are again raised by plaintiff in this proceeding. It was held in Healea v. Verne, 343 Ill. 325, that the doctrine of estoppel by verdict applies to judgments of Probate courts, and that issues adjudicated cannot be reviewed in a collateral proceeding.

It is next argued that plaintiff was not a party to, and the issues raised by her complaint were not litigated in, the administration proceedings had in the Douglas County court. However, she was a party to those proceedings, a legatee under her father's will, and she participated in the proceedings, at least to the extent of petitioning the County court for the appointment of the four original executors,

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and her qualification as one of them, the filing of her claim in the estate, the prosecution of an appeal from the allowance of other claims, her representation by attorneys of record, her negotiation for settlement of claims, and the division of property and the purchase of a parcel of the real estate sold by the administrator; she had notice of all steps taken, received copies of the administrator's current, annual and final reports and accounts, and was notified of the hearing on the final account as provided by the Nebraska statute. As a matter of fact she does not even contend that the matters in this suit were not adjudicated in the Probate proceedings, but merely alleges that they were not litigated by her, and therefore not adjudicated against her. We had occasion to pass upon a similar contention in Gilbert v. Rosenberg et al., 313 Ill. App. 353 (not pub.), wherein it was urged that plaintiff's participation in a reorganization proceeding in the United States District court under section 77-B of the Bankruptcy Act was not an adjudication of her right to maintain suits in the Municipal court against defendants as guarantors of the mortgage bonds which were the subject of reorganization in the Federal court. The decisions cited and reviewed in that case are all to the effect that where a party has full opportunity to join in jurisdictional issues which are necessarily involved in the proceeding, he is concluded by the judgment therein. In the case at bar, even though plaintiff did not specifically contest the jurisdiction of the Douglas County court, she had full opportunity to do so, and had her choice to appeal or abide by the decree. In Riehle v. Margolies, 279 U. S. 218, it was held that in the absence of fraud or collusion, the mere failure to litigate does not prevent a judgment from operating as res adjudicata, where the court had jurisdiction of all the parties.

This leads to a consideration of plaintiff's remaining contention, namely, that section 30-1408 of the Nebraska statutes gave her an option of charging damages alleged to have been sustained in the administrator's account, or suing upon his bond. Her suit is

and her qualification as one of them, the filing of her claim in the estate, the prosecution of an appeal from the allowance of other claims, her representation by attorneys of record, her negotiation for settlement of claims, and the division of property and the purchase of a parcel of the real estate sold by the administrator; she had notice of all steps taken, received copies of the administrator's current, annual and final reports and accounts, and was notified of the hearing on the final account as provided by the Nebraska statute. As a matter of fact she does not even contend that the matters in this suit were not adjudicated in the Probate proceedings, but merely alleges that they were not litigated by her, and therefore not adjudicated against her. We had occasion to pass upon a similar contention in Gilbert v. Rosenberg et al., 313 Ill. App. 323 (not pub.), wherein it was urged that plaintiff's participation in a reorganization proceeding in the United States District court under section 77-B of the Bankruptcy Act was not an adjudication of her right to maintain suits in the Municipal court against defendants as guarantors of the mortgage bonds which were the subject of reorganization in the Federal court. The decisions cited and reviewed in that case are all to the effect that where a party has full opportunity to join in jurisdictional issues which are necessarily involved in the proceeding, he is concluded by the judgment therein. In the case at bar, even though plaintiff did not specifically contest the jurisdiction of the Douglas County court, she had full opportunity to do so, and had her choice to appeal or abide by the decree. In Wright v. Landoltz, 279 U. S. 218, it was held that in the absence of fraud or collusion, the mere failure to litigate does not prevent a judgment from operating as res adjudicata, where the court had jurisdiction of all the parties. This leads to a consideration of plaintiff's remaining contention, namely, that section 30-1408 of the Nebraska statutes gave her an option of charging damages alleged to have been sustained in the administrator's account, or suing upon his bond. Her suit is

directed against the surety and not against the administrator. As we read the statute, it provides two remedies in favor of the injured party for waste committed as defined in the statute, one a charge for damages upon the administrator's accounting and the other a suit upon the administration bond. It does not give a right to pursue both remedies successively, for the word "or" separates the alternative remedies, and we find nothing in the statute which is intended to destroy the effect of a prior adjudication upon an action based upon either of the remedies, especially after a barring adjudication. Since plaintiff sat by in a proceeding to which she was a party and wherein the administrator's account was being settled and determined by the court, and all the administrator's acts approved, she cannot, under that statute, make a collateral attack in a suit upon the bond. Courts have generally held that irrespective of which of two alternative proceedings is brought first, it is the first final judgment between the parties which determines the issues. Chicago Rock Island & Pacific Ry. Co. v. Schendel etc., 270 U. S. 611. Since it appears from the pleadings that the estate was administered prior to the order of discharge, that the court had jurisdiction to determine the issues which plaintiff alleges constituted a breach of the bond, and that she was a party to the proceeding, and the court having made a determination of these issues adverse to the contentions made by plaintiff in her suit on the bond, we are of opinion that the Nebraska statute is not susceptible of an interpretation which would prevent this adjudication from having the barring effect contended for by defendant. The decree of the Douglas County court exonerated and acquitted the administrator from liability in connection with his administration, and his discharge thereby released the surety.

There is the additional circumstance that since plaintiff specifically released the administrator and his bond from further liability, and accepted her distributive share of the proceeds of the estate, she cannot retain these payments and at the same time attack the decree which approved the acts of the administrator. The authori-

the decree which approved the acts of the administrator. The authorities cannot retain these payments and at the same time attack liability, and accepted her distributive share of the proceeds of the estate, specifically released the administrator and his bond from further liability. There is the additional circumstance that since plaintiff his discharge thereby released the surety.

administrator from liability in connection with his administration, and degree of the Douglas County court exonerated and acquitted the action from having the barring effect contended for by defendant. This is not susceptible of an interpretation which would prevent this adjustment in her suit on the bond, we are of opinion that the Nebraska statute mitigation of these issues adverse to the contentions made by plaintiff she was a party to the proceeding, and the court having made a determination which plaintiff alleges constituted a breach of the bond, and that of discharge, that the court had jurisdiction to determine the issues from the pleadings that the estate was administered prior to the order Re Pacific Ry. Co. v. Schenkel et al., 270 U. S. 811. Since it appears between the parties which determines the issues. Chicago Hook Island native proceedings is brought first, it is the first final judgment Courts have generally held that irrespective of which of two alter- under that statute, make a collateral attack in a suit upon the bond. by the court, and all the administrator's acts approved, she cannot, wherein the administrator's account was being settled and determined since plaintiff set by in a proceeding to which she was a party and either of the remedies, especially after a barring adjudication. destroy the effect of a prior adjudication upon an action based upon remedies, and we find nothing in the statute which is intended to remedies successively, for the word "or" separates the alternative the administration bond. It does not give a right to pursue both damages upon the administrator's accounting and the other a suit upon party for waste committed as defined in the statute, one a charge for we read the statute, it provides two remedies in favor of the injured directed against the surety and not against the administrator. As

ties in this state are uniformly to the effect that a party to a decree cannot avail himself of those parts of the decree which are beneficial to him and thereafter prosecute an appeal to reverse the part of the decree which is unfavorable. If he accepts the benefits he is held to have released the errors concerning which he would complain, and to have ratified the decree in its entirety. Kellner v. Schmidt, 237 Ill. App. 428. The suit at bar is directed against the surety alone. The bond upon which plaintiff sues is conditioned upon the faithful performance and discharge by the administrator of his duties as such, and the surety's liability cannot exceed that of its principal. The reason for this is aptly set forth in Trotter, etc. v. Strong, etc., 63 Ill. 272, wherein the court said: "If he [the surety] were held liable, he could not recover over against the principal, because he [the principal] is discharged from the debt and owes the creditor nothing, ***. To enforce payment from the surety under such circumstances, would be to deprive him of his legal right to be reimbursed for the money thus paid. It would change the relations of principal and surety, deprive the latter of a legal right, and would operate unjustly."

The circumstances with respect to the judgment in favor of defendant entered by Judge Barnes in the Federal court in the suit brought by Louise Augustus, one of the Magee heirs, which was appealed to the Circuit Court of Appeals for the 7th Circuit, and concerning the judgment entered in the Circuit court adverse to Jerome Magee, are fully set forth in defendant's affidavit supporting the amendment to its motion to dismiss plaintiff's complaint, to which no counteraffidavit or other pleading was filed. The supporting affidavit specifically charges that in each of the suits brought by Louise and Jerome, the same issues were involved and the same breaches were alleged as are alleged by plaintiff in this proceeding, and that Louise's suit was for \$10,000, the full penalty of the administrator's bond. Defendant

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surety] were held liable, he could not recover over against the principal, because he [the principal] is discharged from the debt and owes the creditor nothing, *** To enforce payment from the surety under such circumstances, would be to deprive him of his legal right to be reimbursed for the money thus paid. It would change the relation of principal and surety, deprive the latter of a legal right, and would operate unjustly."

The circumstances with respect to the judgment in favor of defendant entered by Judge Barnes in the Federal court in the suit brought by Louise Augustus, one of the Wages heirs, which was appealed to the Circuit Court of Appeals for the 7th Circuit, and concerning the judgment entered in the Circuit court adverse to Jerome Wages, are fully set forth in defendant's affidavit supporting the amendment to its motion to dismiss plaintiff's complaint, to which no counteraffidavit or other pleading was filed. The supporting affidavit specifically charges that in each of the suits brought by Louise and Jerome, the same issues were involved and the same breaches were alleged as are alleged by plaintiff in this proceeding, and that Louise's suit was for \$10,000, the full penalty of the administrator's bond. Defendant

charged that plaintiff was in privity with her sister and brother, and is bound by the judgment in favor of the defendant in each of those suits. Since, as heretofore stated, plaintiff failed to deny any of these facts, they must be taken as admitted. The exhaustive opinion of the Circuit Court of Appeals appears in 100 Fed. Rep. (2d) 581. Plaintiff takes the position that she is not bound and concluded by those judgments because she was not a party to either proceeding. Section 30-1511 of the Nebraska statutes provides: "When an action is rightfully brought by any creditor, heir at law, next of kin, or legatee pursuant to the provisions of this chapter, the same shall, so far as the causes of action therein are concerned, be a bar to any other cause of action which might have accrued under the provisions of this chapter, but no further; ***" It was obviously the purpose of this statute to prevent the administrator and his surety from being subjected to numerous suits by several parties for the same alleged breach of his bond, and is declaratory of the common law which requires a suit upon an administrator's bond where it was charged that he failed properly to administer the estate or wasted or converted assets, to be brought for the benefit of the estate and not for the benefit of a particular legatee. 34 Corpus Juris Secundum 1197, sec. 967, and case cited therein. The heirs in the case at bar have sought by their several suits to avoid the effect of the statute, and they should not be permitted to continue to do so. In O'Connor v. Board of Trustees, 247 Ill. 54, and Chamblin v. Chamblin, 362 Ill. 588, the court enunciated the common law rule that a former adjudication is binding not only upon the parties to a proceeding but upon the privies of all parties thereto as well. In Moore v. Shook, 276 Ill. 47, "privity" is defined as denoting mutual or successive relationship to the same rights of property, and "privies" were held to be "persons who are partakers of or have an interest in any action or thing or any relation to another." Undoubtedly plaintiff had a mutual interest with her sister and brother in their father's estate, and under the common

charged that plaintiff was in privity with her sister and brother, and is bound by the judgment in favor of the defendant in each of those suits. Since, as heretofore stated, plaintiff failed to deny any of those facts, they must be taken as admitted. The exhaustive opinion of the Circuit Court of Appeals appears in 100 Fed. Rep. (2d) 581. Plaintiff takes the position that she is not bound and compelled by those judgments because she was not a party to either proceeding. Section 30-1511 of the Nebraska statutes provides: "When an action is rightfully brought by any creditor, heir at law, next of kin, or legatee pursuant to the provisions of this chapter, the same shall, so far as the causes of action therein are concerned, be a bar to any other cause of action which might have accrued under the provisions of this chapter, but no further; ***" It was obviously the purpose of this statute to prevent the administrator and his surety from being subjected to numerous suits by several parties for the same alleged breach of his bond, and as declaratory of the common law which requires a suit upon an administrator's bond where it was charged that he failed properly to administer the estate or wasted or converted assets, to be brought for the benefit of the estate and not for the benefit of a particular legatee. 34 Corpus Juris Secundum 1197, sec. 967, and case cited therein. The heirs in the case at bar have sought by their several suits to avoid the effect of the statute, and they should not be permitted to continue to do so. In O'Connor v. Board of Trustees, 247 Ill. 54, and Granville v. Granville, 362 Ill. 788, the court enunciated the common law rule that a former adjudication is binding not only upon the parties to a proceeding but upon the privies of all parties thereto as well. In Moore v. Shook, 276 Ill. 47, "privity" is defined as denoting mutual or successive relationship to the same rights of property, and "privies" were held to be "persons who are partakers of or have an interest in any action or thing or any relation to another." Undoubtedly plaintiff had a mutual interest with her sister and brother in their father's estate, and under the common

acceptation of the term as defined by the authorities, she was in privity with them.

The last contention advanced is that the court had no power to tax the costs of certain depositions against plaintiff, nor to submit to defendant for decision the amount to be taxed as costs. The order provided that the commissioner's fees and expenses in taking and reporting depositions should be paid for by plaintiff. No amount is fixed in the order, and plaintiff is required to pay whatever sum may have been agreed upon by the defendant and the commissioner. We think that under section 37, chapter 51, Ill. Rev. Stat. 1939, the court properly taxed plaintiff with costs of the depositions taken. Under the decisions of our courts, unless a motion to retax the costs appears in the record of appeal, the action of the trial court thereon will not be reviewed. Symms v. City of Chicago, 115 Ill. App. 169; Mitchell v. Art Institute of Chicago, 269 Ill. 381. No such motion was made in the case at bar, and therefore nothing is preserved in the record upon which the argument with respect to the taxation of costs may be predicated.

For the reasons given we are of opinion that the judgment of the Superior court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

acceptation of the term as defined by the authorities, she was in privity with them.

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For the reasons given we are of opinion that the judgment of the Superior court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scamman, J., concur.

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Abstract

GENERAL NO. 9802

AGENDA NO. 5

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

313 I.A. 636³

October Term, A. D. 1942

RUTH WEST,
Appellee

v.

SAMUEL PORRITT, Jr.,
Appellant

APPEAL FROM
CIRCUIT COURT OF
KNOX COUNTY.

ARDEN WEST,
Appellee

v.

SAMUEL PORRITT, Jr.,
Appellant

DOVE, J.:

Appellees each filed a separate suit in the circuit court of Knox County against appellant for damages on account of injuries received in an automobile collision. Each of the complaints alleges that the defendant was driving his car in a westerly direction on a paved public highway known as State Highway No. 150, at a point about five miles east of the City of Knoxville; that the plaintiff was a passenger in a car driven by Ronald West in an Easterly direction on

APPEAL

AGENDA NO. 3

GENERAL NO. 3803

IN THE

APPELLATE COURT OF ILLINOIS

SOUTH DISTRICT

313 I.A. 686

October Term, A. D. 1942

WILLIAMS

Appellee

v.

CARROLL FORBETT, JR.

Plaintiff

KNOW COUNTY

IN THE COURT OF

KNOW COUNTY

ORDER SET

Appellee

v.

CARROLL FORBETT, JR.

Appellant

DOVE, J.

Appellee also filed a separate suit in the circuit court of Know County against plaintiff for damages on account of injuries received in an automobile collision. Each of the complaints alleges that the defendant was driving his car in a westerly direction on paved public highway known as State Highway No. 150, at a point about five miles east of the City of Knoxville; that the plaintiff was a passenger in a car driven by him in west to an easterly direction on

the south side of the center line of the highway, and was exercising due care and caution for her (his) own safety; that the defendant negligently, carelessly and without any warning, turned and drove his car west and south to his left onto the south side and across the center line of the highway, colliding with the car in which the plaintiff was riding; that the defendant did one or more of the following acts, and thereby caused injury to the plaintiff: Negligently operated his car at a speed greater than was reasonable and proper having regard for the traffic and the use of the way and so as to endanger the life and limb and injure the plaintiff, in violation of section 49, article 6, chapter 95 $\frac{1}{2}$, Illinois Revised Statutes, 1939; negligently failed to give the driver of the car in which the plaintiff was riding at least one-half of the main travelled portion of the highway, as the defendant attempted to pass, and negligently failed to drive his car upon his right half of the highway, in violation, respectively, of sections 55 and 54 of the same act; and otherwise so negligently managed and operated his car that it ran into and in front of and collided with the car in which the plaintiff was riding; and that, contrary to the provisions of the statutes of this State, the defendant carelessly and negligently turned his car from a direct course onto the south half of the highway, and in front of the car in which the plaintiff was riding when such movement could not be made with reasonable safety. This is followed by allegations of specific injuries as the direct and proximate result of the alleged carelessness and negligence. Answers were filed, the two causes were consolidated, a motion to consolidate therewith the cause of defendant's wife, Betty Porritt, against Ronald West was denied, and there was a jury trial, resulting in a verdict of \$3,000.00 for Arden West, and a verdict of \$1,800.00 for Ruth West. Judgment was entered on the verdicts and the defendant has appealed from the judgment.

the south side of the center line of the highway, and was exercising due care and caution for her (Miss) own safety; that the defendant negligently, carelessly and without any warning, turned and drove his car west and south to his left onto the south side and across the center line of the highway, colliding with the car in which the plaintiff was riding; that the defendant did one or more of the following acts, and thereby caused injury to the plaintiff: Negligently operated his car at a speed greater than was reasonable and proper having regard for the traffic and the use of the highway and so as to endanger the life and limb and injure the plaintiff, in violation of section 43, article 6, chapter 95, Illinois Revised Statutes, 1953; negligently failed to give the driver of the car in which the plaintiff was riding at least one-half of the main travelled portion of the highway, as the defendant attempted to pass, and negligently failed to drive his car upon his right half of the highway, in violation, respectively, of sections 33 and 34 of the same act; and otherwise so negligently managed and operated his car that it ran into and in front of and collided with the car in which the plaintiff was riding; and that, contrary to the provisions of the statutes of this State, the defendant carelessly and negligently turned his car from a direct course onto the south half of the highway, and in front of the car in which the plaintiff was riding when such movement could not be made with reasonable safety. This is followed by allegations of specific injuries as the direct and proximate result of the alleged careless and negligent operation of the car. The two causes were consolidated, a motion to consolidate the same was granted, and there was a jury trial, resulting in a verdict of \$2,000.00 for the plaintiff, and a verdict of \$1,800.00 for the defendant. Judgment was entered on the verdicts and the defendant has appealed from the judgment.

The points urged for reversal are that the court erred in the giving and in the refusal of instructions to the jury; in denying appellant's motion in each cause to set aside the verdict and for a new trial, on the grounds that the verdict is against the manifest weight of the evidence and is so grossly excessive as to clearly evidence passion, prejudice and ill will, or undue sympathy for the plaintiff, or a misunderstanding as to the measure and elements of damage properly warranted by the evidence under the instructions of the court.

The accident occurred about 8 o'clock on the evening of May 25, 1940, on a hill on State Highway No. 150, at a point about five miles east of the City of Knoxville. The highway runs east and west at that point, and the paved portion is eighteen feet wide, with a black line along the center. The hill/ ^{hereinafter referred to} is about 1000 feet long with the top at the east end, where there is a sharp down grade. The highway is level for about a mile and a half east of the top of the hill. There is a cement gutter twenty inches wide, and two or three inches deep, along each side of the pavement on the hill. The gutter on the north side starts about 200 feet from the top of the hill and continues to the bottom, except where it is interrupted by a drive way about fifty feet east of where the collision occurred.

Ronald West, husband of appellee Ruth West, was driving his 1939 Ford V-8 sedan east up the hill on the south side of the black center line. Ruth West sat on the front seat at the right of the driver, holding their infant child on her lap. Appellee Arden West, and his wife, parents of the driver, sat on the rear seat. They had been visiting during the day at their son's home near Maquon, and were being taken to their home at Dahinda.

The points urged for reversal are that the court erred in

the ruling and in the refusal of instructions to the jury; in

denying appellant's motion in error to set aside the verdict

and for a new trial, on the grounds that the verdict is against

the manifest weight of the evidence and is so grossly excessive as

to clearly evidence passion, prejudice and ill will, or undue

sympathy for the plaintiff, or a misunderstanding as to the evidence

and elements of damage properly warranted by the evidence under the

instructions of the court.

The accident occurred about 8 o'clock on the evening of May 25,

1940, on a hill on State Highway No. 120, at a point about five miles

east of the city of Knoxville. The highway runs east and west at

that point, and the paved portion is eighteen feet wide, with a black

line along the center. The width of the road is about 100 feet long at the top at

the east end, where there is a sharp down grade. The highway is level

for about a mile and a half east of the top of the hill. There is a

concrete gutter twenty inches wide, and two or three inches deep, along

each side of the pavement on the hill. The gutter on the north side

starts about 200 feet from the top of the hill and continues to the

bottom, except where it is interrupted by a drive way about fifty feet

east of where the collision occurred.

Ronald West, husband of appellee Mary West, was driving his 1939

Ford V-8 sedan east up the hill on the south side of the black center

line. West was at the front seat at the right of the driver.

Holding their infant child on her lap, Appellee Mary West, and his

wife, parents of the driver, sat on the rear seat. They had been

visiting during the day at their son's home near Jackson, and were being

taken to their home at Dandridge.

Appellant, accompanied by his wife, was driving a 1938 Hudson five passenger convertible coupe west along the highway. They lived in Peoria and were enroute to Davenport, or Rock Island. It had been raining and the pavement was wet. It was dark and misting and the ~~lights on both cars were turned on.~~ The shoulder outside the gutter was muddy and somewhat soft. The collision occurred about 400 feet west of the top of the hill. The car in which appellees were riding was at all times south of the center line of the pavement. Another car, occupied by Anton Larson, his wife and James Mahar, Jr., traveling west down the hill at between thirty and thirty-five miles per hour, immediately preceding appellant's car, met and passed the car in which appellees were riding, about half way down the hill. Appellant's car crossed to the south side of the pavement and collided with the car in which appellees were riding, whereby they were severely injured. The lights on all three cars were turned on.

Appellant testified that when he was from one hundred to two hundred feet back from the top of the hill his car was going between forty five and fifty miles per hour; that when he got to the top of the hill he noticed a car immediately ahead of him and a car coming up the hill; that the car in front of him was about half way down the hill, going about twenty-five miles an hour, and the car coming from the opposite direction was about one third of the way up the hill, moving at a pretty good rate of speed; that when he first saw the car ahead of him he applied his brakes and his car pulled to the right off onto the shoulder into soft mud; that he released his brakes and gradually pulled back onto the pavement and again applied the brakes; that the left wheels held, but the right wheels were muddy and did not hold; that turning his car to the left put him into a slide, and he skidded, fifty to seventy five feet sidewise, across the road; that he skidded west and the front of the car was heading south; that the closest he ever came to the car in

Appellant, accompanied by his wife, was driving a 1938 Hudson five passenger convertible coupe west along the highway. They lived in Peoria and were enroute to Evanston, or Rock Island. It had been raining and the pavement was wet. It was dark and misting and the road was muddy and somewhat soft. The collision occurred about 400 feet west of the top of the hill. The car in which appellees were riding was at all times south of the center line of the pavement. Another car, occupied by Anton Larson, his wife and James Harp, Jr., traveling west down the hill at between thirty and thirty-five miles per hour, immediately preceding appellant's car, met and passed the car in which appellees were riding, about half way down the hill. Appellant's car crossed to the south side of the pavement and collided with the car in which appellees were riding, whereby they were severely injured. The lights on all three cars were turned on.

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front of him was fifty to sixty feet; that the car coming up the hill hit him directly on the right side and did not change its speed as it came up the hill; that he had been over the road three or four times prior to the collision; and that just before he reached the top of the hill he could not see anything down the hill. He further testified that about a week after the accident Ronald West told him he (West) was driving between fifty and sixty miles per hour. West denied making the statement.

Betty Porritt, appellant's wife, testified substantially the same as her husband as to the speed of his car. She also testified that as they started over the top of the hill, she saw a dark shaped object in front of them going the same direction about three car lengths ahead, and as they started to slide, she saw the headlights of a car coming in the opposite direction, about the length of the court room away from them; that they were riding along and came upon the dark car; that the tail light showed up and they started to slide sideways; that she screamed and that was the last she remembered until she woke up the following Tuesday; that when the car started to slide, her husband turned the wheel as fast as he could to keep on going the same direction, turning to the right, trying to straighten the car; that she could not remember getting back on the pavement, it all happened so quickly, and she did not even feel the crash.

James Mahar, Jr., testified that on the road to the hospital, after the accident, appellant told him he turned out to keep from hitting the car ahead of him, and said they were late and were on their way to Davenport or Rock Island.

Ronald West and his wife each testified he was driving between thirty five and forty miles per hour. She has driven a car seventeen or eighteen years. A stenographer testified that in a conversation at Maquon three days after the accident Ronald West said he was driving

front of him was fifty to sixty feet; that the car coming up the hill hit him directly on the right side and did not change its speed as it came up the hill; that he had been over the road three or four times prior to the collision; and that just before he reached the top of the hill he would not see anything down the hill. He further testified that about a week after the accident Ronald testified that he was driving between fifty and sixty miles per hour. West denied making the statement.

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James Baker, Jr., testified that on the road to the hospital, after the accident, appellant told him he turned out to keep from hitting the car ahead of him, and said they were late and were on their way toavenport or Rock Island.

Ronald West and his wife each testified he was driving between thirty five and forty miles per hour. He has driven a car seventeen or eighteen years. A stenographer testified that in a conversation at Madison three days after the accident Ronald said he was driving

between forty and fifty miles per hour. West denied making the statement. He testified that when he first saw appellant's car coming over the hill it was straddling the black line, and then pulled over north of the line, as it proceeded, and the next thing that happened was that it was right in front of him; that he could not say how far it travelled on the north side of the road; that he was not watching it to see whether it was spinning or skidding at that time, and that he did not watch appellant again until he slowed up coming very nearly straight across the road when he turned to the south.

Appellee Ruth West was thirty five years old. She suffered injuries to her jaw, the upper and lower front teeth were loosened, the upper teeth separated, her eyes and face were blackened, her left knee lacerated, her ninth and tenth ribs were broken, from which she contracted traumatic pneumonia lasting five to seven days, her chest was bruised, and she developed phlebitis in the left leg, involving a considerable area. This condition is very painful and in a majority of cases is permanent. She was confined to the hospital thirty nine days, and to her bed at home for a week longer. It was about four months before she could do any ordinary house work. At the time of the trial, almost two years after the accident, her teeth were still loose and separated, and she still suffered from her injuries, including the phlebitis, and was still unable to do her house work as she had done before the accident. Her left leg and ankle were swollen, the circumference of the calf of that leg being more than one inch greater than that of the other leg. Her hospital bill was \$395.45, with probable dental expense to be incurred of \$200.00. Prior to her injuries she was in good health.

Appellee Arden West suffered a fracture of the third cervical vertebra, and in the healing process a bony structure united the third and fourth vertebrae, resulting in limited motion and pain which was still present at the time of the trial. His hospital and doctor bill

between forty and fifty miles per hour. He testified that when he first saw appellant's car coming over the hill it was traveling the full line, not down the middle of the road, and the next thing he noticed was that it was right in front of him; that he could not see it far in front on the north side of the road; that he was not watching it to see where it was going or whether it was that close, and that he did not watch it until he slowed up coming very nearly straight across the road when he turned to the south. Appellee's car was thirty five years old. She testified that when she saw the car, the upper and lower front teeth were loosened, the upper teeth separated, her eyes and face were distorted, her left knee fractured, her right arm and hand were broken, her right arm was fractured, and she sustained a very painful and in a majority of cases is permanent. She was confined to the hospital for thirty nine days, and to her bed at home for a week longer. It was about four months before she could do any ordinary house work. At the time of the trial, almost two years after the accident, her teeth were still loose and separated, and she still suffered from her injuries, including the fractures, and was still unable to do her house work as she had done before the accident. Her left leg and ankle were swollen, the circumference of the calf of her left leg being more than one inch greater than that of her right leg. Her hospital bill was \$203.44, with medical bills expended to be incurred of \$200.00. Prior to her injuries she was in good health. Appellee's car was a first-class of the third carload, and in the healing process a bony structure called the third and fourth vertebrae, resulting in limited motion and pain which was still present at the time of the trial. The hospital and doctor bill

amounted to \$128.30. He was sixty years old, earning \$700.00 to \$800.00 a year as a carpenter, cement worker and painter. Since his injuries he has been able to perform only light janitor work at \$40.00 per month, in which he was employed nine months of the year. According to his fourteen years life expectancy, with a loss of more than \$300.00 per year, the damages awarded him are much less than the loss of his probable earnings.

Appellant's theory of the case is that the collision was the result of an accident, without negligence on his part, and that for that reason the court erred in refusing to set aside the verdicts and grant the motion for a new trial. The testimony of appellant shows that he had previously been over the road three or four times. It was dark, the pavement was wet, it was misting, and yet he was driving at a speed of from forty five to fifty miles per hour, immediately approaching a hill which he must have known was there, and he could not see anything down the hill until he reached the top. He testified that as he came over the top of the hill and discovered the Larson car, it was half way down the hill, but his wife placed it about three car lengths ahead. Mrs. Larson testified that the lights on appellant's car kept getting ^{brighter} and it was very close to them.

The testimony shows that in trying to avoid striking the Larson car appellant applied his brakes. Due to the speed at which he was travelling and to the force with which he applied his brakes and to the wet pavement, his car skidded first to the right onto the muddy shoulder, and then to the left heading south. When he regained the pavement he again applied his brakes and the car crossed the black line into the east traffic lane. There is no testimony which shows that appellees or the driver of the car in which they were riding observed or could

mounted to \$138.50. He was sixty years old, earning \$70.00 a
 year as a carpenter, cement worker and painter. Since his
 injuries he has been able to perform only light duties worth \$40.00
 per month. In which he has employed him a number of the years. Accord-
 ing to his doctor's report his life expectancy is only 10 years. His
 \$30.00 per year, the lawyer would have been more than his life
 of his probable earnings.

Plaintiff's theory of the case is that the collision was the
 result of an accident, without negligence on his part, and that for
 that reason the court should in returning to him the value of his
 grant the motion for a new trial. The testimony of several witnesses that
 he had previously been over the road three or four times. It was stated
 that movement was not, it was stated, and yet he was driving at a speed
 of from twenty-five to thirty miles per hour, immediately preceding a
 fall which he must have known was there, and he could not see anything
 from the hill until he reached the top. He testified that as he came
 over the top of the hill and descended the eastern end, it was half way
 down the hill, but his wife placed it about three car lengths ahead.
 Mr. Larson testified that the lights on plaintiff's car were not
 on and it was very close to them.

The testimony shows that in trying to avoid striking the Larson
 car plaintiff applied his brakes. As to the speed at which he was
 travelling and to the force with which he applied the brakes and to the
 movement, his car rolled first to the right onto the main road, and
 then to the left heading south. When he regained the street he
 again applied his brakes and the car crossed the black line into the
 east traffic lane. There is no testimony which shows that anyone
 or the driver of the car in which they were riding observed or heard

have seen that appellant was in any difficulty before his car skidded across the pavement into the car in which they were riding, or that any of them omitted to do or could have done anything which would have avoided the collision. Under such circumstances the question of appellant's negligence was a question of fact properly submitted to the jury. There was no error in denying the motion to set aside the verdicts and for a new trial on the ground that the verdicts are against the manifest weight of the evidence.

Under the claim that the verdicts are excessive, the following incidents are relied upon by appellant as inciting prejudice, passion and undue sympathy in the minds of the jury: An unsolicited and inadvertent remark of one of the doctors, while testifying, that his record of the time Ruth West stayed in the hospital was a retained copy of his report to the insurance company; his testimony that in pneumonia, traumatic or otherwise, the patient's life is always in danger, with a comment by appellees' counsel that he found that out several years ago; the cross-examination of the stenographer above mentioned as to who employed her; and an objection to the testimony of Mrs. Porritt that it had rained all day, on the ground that she would not know what the weather was at the place of the accident. The statement by the doctor as to an insurance company did not inform the jury that appellant was insured, or that his insurer had any connection with the case. So far as the jury were concerned, they could have believed the witness referred to accident or life insurance held by Ruth West. Nor did the cross-examination of the stenographer tend to show she was employed by appellant's insurer. Considering the nature, extent and permanency of appellee's injuries the verdicts were not large and we see no indication that the jury were influenced by any of the matters complained of by appellant.

have seen that appellant was in my difficulty before his car skidded across the pavement into the car in which they were riding, or that any of them omitted to do or could have done anything which would have avoided the collision. Under such circumstances the question of appellant's negligence was a question of fact properly submitted to the jury. There was no error in denying the motion to set aside the verdict and for a new trial on the ground that the verdicts are against the manifest weight of the evidence.

Under the claim that the verdicts are excessive, the following incidents are relied upon by appellant as inducing prejudice, passion and undue sympathy in the minds of the jury: An unsolicited and inadvertent remark of one of the doctors, while testifying that his record of the time Ruth West stayed in the hospital was a retained copy of his report to the insurance company; his testimony that in phrenetic, traumatic or otherwise, the patient's life is always in danger, with a comment by the witness' counsel that he found that out ever 1 year ago; the cross-examination of the witness rather above mentioned as to who employed her; and an objection to the testimony of Mrs. Forrist that it had rained all day, on the ground that she would not know what the weather was at the place of the accident. The statement by the doctor as to an insurance company did not inform the jury that appellant was insured, or that his insurer had any connection with the case. So far as the jury were concerned, they could have believed the witness referred to accident or life insurance held by Ruth West. For the cross-examination of the stenographer tend to show she was employed by appellant's insurer. Considering the nature, extent and permanency of appellant's injuries the verdicts were not large and we see no indication that the jury were influenced by any of the matters complained of by appellant.

Under the claim that the court erred in the giving and in the refusal of instructions, appellant invokes the familiar rule that where a case is close on the facts and its decision depends and must be determined upon conflicting testimony, the jury should be accurately instructed. (Edwards v. Hill-Thomas Lime & Cement Co., 378 Ill. 180.) The jury should always be accurately instructed, but in this case there is no conflict in the material testimony and it is not a close case on the facts.

Instruction No. 14, complained of by appellant, told the jury that the degree of care that the plaintiffs were required to exercise for his or her own safety at and before the time of the accident was ordinary care, and if the jury believed, from a preponderance of the evidence, that the plaintiffs, at the time of and before the collision, exercised the degree of care for his or her own safety that an ordinarily prudent person, who was in the full possession of all of his or her powers and faculties, would have exercised under the same circumstances and conditions that the evidence in this case shows surrounded the plaintiffs at and before the time of the collision, then they should find that the plaintiffs at and before the time of the collision were, and each of them was, in the exercise of ordinary care for his or her own safety. In the Edwards case, supra, relied upon by appellant, an instruction which did not cover the time before the accident, thus ignoring the fact that the plaintiff might have been negligent in placing himself in the position in which he found himself, was condemned. The instruction in the case at bar embraces the time both at and before the collision, and is not subject to that criticism.

Instructions 15 and 16, complained of, are identical except for the name and sex of the plaintiff. They told the jury that if they

Under the claim that the court erred in the giving and in the refusal of instructions, appellant invokes the familiar rule that where a case is close on the facts and its decision depends and must be determined upon conflicting testimony, the jury should be instructed. (Adwards v. Will-Thoms Lumber & Cement Co., 228 Ill. 130.) The jury should always be accurately instructed, but in this case there is no conflict in the material testimony and it is not a close case on the facts.

Instruction No. 14, complained of by appellant, told the jury that the degree of care that the plaintiff was required to exercise for his own safety at and before the time of the accident was ordinary care, and that the jury believed from the circumstances of the evidence, that the plaintiff, at the time of and before the collision, exercised the degree of care for his own safety that an ordinarily prudent person would in the full possession of all of his own powers and faculties, would have exercised under the same circumstances and conditions that the evidence in this case shows surrounded the plaintiff at and before the time of the collision, when they should find that the plaintiff at and before the time of the collision were, and each of them was, in the exercise of ordinary care for his own safety. In the words used, expert, relied upon by appellant, an instruction which it not covers the time before the accident, thus ignoring the fact that the plaintiff might have been negligent in placing himself in the position in which he found himself, was condemned. The instruction in the case was not subject to that the time both at and before the collision, and he not subject to that criticism.

Instructions 15 and 16, complained of by appellant, exempted for the name and sex of the plaintiff. They told the jury that if they

found from a preponderance of the evidence that the plaintiff was injured by negligence of the defendant as charged and that at and before the time of the collision the plaintiff was in the exercise of ordinary care and caution for his own safety and that when he was injured he was riding as a guest passenger in the automobile being driven by Ronald West, even though it should appear that the driver was guilty of some want of care which contributed in some measure toward bringing about the collision, such want of care, if any, on the part of the driver cannot be imputed to the plaintiff.

Appellant claims these two instructions are erroneous because they do not define the duty of a passenger, and rely upon *Briske v. Village of Burnham*, 379 Ill. 193, where it is held that it is the duty of a passenger in a vehicle, where he has an opportunity to learn of the danger and avoid it, to warn the driver of approaching danger, and he has no right, because some one else is driving, to omit reasonable and prudent efforts on his own part to avoid danger. In that case the principle stated was applied where a barricade across a street was visible a long way ahead. In the case at bar there is no testimony that tends to show that appellees could have apprehended any danger before appellant's car skidded across the pavement and collided with the car in which they were riding. According to the testimony of appellant's wife it all happened so quickly she did not even remember of getting back onto the pavement after the car first skidded to the right onto the shoulder. It is apparent from all the testimony that there was no opportunity for appellees to have said or done anything that might have avoided the accident. The holding in the *Burnham* case is not applicable here.

found from a preponderance of the evidence that the plaintiff was injured by negligence of the defendant as charged and that it was before the time of the collision the plaintiff was in the exercise of ordinary care and caution for his own safety. He was not injured by any fault of the defendant in the automobile being driven by the defendant, even though it was not until the collision was that of some want of care which constituted a negligence. Plaintiff bringing about the collision, such want of care, if any, on the part of the driver is not to be imputed to the plaintiff. Plaintiff claims these two instructions to the jury are erroneous. They do not define the duty of a passenger, and rely upon *Smith v. Village of Bannock*, 373 Ill. 183, where it is held that it is the duty of a passenger in a vehicle, where he is in no opportunity to learn of the danger and avoid it, to warn the driver of approaching danger, and he has no right, and no duty, to avoid the danger. It is only when and present efforts on his own part to avoid danger. In this case the principle stated was applied and a verdict was entered in favor of the plaintiff. In the case at bar there is no testimony that tends to show that the plaintiff could have avoided the collision with the car in which they were riding. According to the testimony of the plaintiff's wife it all happened so suddenly she did not even remember of getting back onto the pavement after the car first collided to the right onto the shoulder. It is apparent from the testimony that there was no opportunity for the plaintiff to have avoided anything that might have caused the accident. The finding in the instant case is not applicable here.

The criticism that the two instructions mentioned are not limited to the negligence charged in the complaint is equally without merit. Instructions which refer the jury to the complaint to determine the issues have been repeatedly condemned. (*Lerette v. Director General of Railroads*, 306 Ill. 348, 354.) The two instructions complained of deal with imputed negligence and do not direct a verdict. (*Bernier v. Illinois Central R. R. Co.*, 296 Ill. 464, 472.) Other given instructions refer the jury to the negligence charged by the plaintiffs. Taken as a series, the jury could not have understood that "negligence charged" referred to any other negligence than that charged by the plaintiffs.

In *Schmidt v. Anderson*, 301 Ill. App. 28, relied upon by appellant, an instruction that the plaintiff could not recover without proving: "That at and immediately prior to the accident in question the plaintiff was not guilty of any negligence which in any degree contributed to cause said accident" was condemned because it required the plaintiff to prove he was not guilty of any negligence which in any degree contributed to the injury, while the rule is that contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care as, concurring or cooperating with the negligent act of the defendant, is the proximate cause of the injury. The two instructions complained of in this case deal only with negligence that could not be imputed to the plaintiffs, on the hypothesis that they were in the exercise of ordinary care and caution and were injured by negligence of the defendant. The holding in the *Schmidt* case has no application here.

has no application here.

by negligence of the defendant. The holding in the Schmidt case were in the exercise of ordinary care and caution and were injured could not be imputed to the plaintiff, on the hypothesis that they tions complained of in this case deal only with negligence that defendant, is the proximate cause of the injury. The two instinc case, occurring or cooperating with the negligent act of the tion on the part of the plaintiff amounting to a want of ordinary the rule is that contributory negligence is such an act or omission negligence which in any degree contributed to the injury, while cause it required the plaintiff to prove he was not guilty of any any degree contributed to cause said accident" was condemned based on the plaintiff was not guilty of any negligence which in out proving: "That at and immediately prior to the accident in- plaintiff, an instruction that the plaintiff could not recover without In Schmidt v. Anderson, 301 Ill. App. 38, relied upon by ap- tions. The existence that the two instructions mentioned are not limited to the negligence charged in the complaint is equally without merit. Instructions which refer the jury to the complaint to determine the issues have been repeatedly condemned. (Larotte v. Director General of Railroads, 378 Ill. 348, 354.) The two instructions complained of deal with alleged negligence and do not direct a verdict. (Bernier v. Illinois Central R. R. Co., 326 Ill. 464, 478.) Other given instructions refer the jury to the negligence charged by the plaintiff. Taken as a series, the jury could not have understood that "negligence charged" referred to any other negligence than that charged by the plaintiff.

to cause said accident" was condemned because it required the plaintiff to prove he was not guilty of any negligence which in any degree contributed to the injury, while the rule is that contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care as, concurring or cooperating with the negligent act of the defendant, is the proximate cause of the injury. The two instructions complained of in this case deal only with negligence that could not be imputed to the plaintiffs, on the hypothesis that they were in the exercise of ordinary care and caution and were injured by negligence of the defendant. The holding in the Schmidt case has no application here.

Complaint is made that the court erred in refusing instructions numbered 3,6,7,8,9,11,12,13,25,27,28 and 29 tendered by appellant. Refused instructions 27 and 28 assume that plaintiffs had an opportunity to learn of danger, warn the driver and avoid the accident. There being no testimony which tends to show there was any such opportunity, there was no error in refusing those instructions. Refused instruction 29 told the jury that if they believe from the evidence that the plaintiff Arden West was not riding as a guest or invited passenger of Ronald West, but that Ronald West was acting as his servant or agent, the negligence of Ronald West, if any, is imputed to the plaintiff, and if Ronald West was guilty of negligence in the management and operation of the automobile which he was driving, and that said negligence, if any, contributed to the injuries suffered by Arden West, if any, then he cannot recover against the defendant, and they should find the defendant not guilty as to him. The testimony discloses that Arden West and his wife were the guests of his son Ronald and family during the day. In the absence of any showing to the contrary, the natural and logical inference is that when Ronald and his family were taking the parents home, the latter were still their guests, and there is no testimony which even tends to show that Ronald West was the agent or servant of his father in so doing. The testimony sufficiently shows that Arden West was merely a guest passenger in the car driven by his son. The instruction not being based on any testimony in the record, was properly refused. The substance

of each of the other refused instructions is covered by other given instructions.

We find no reversible error in the record, and the judgment of the Circuit Court is affirmed.

Judgment Affirmed.

At each of the above named locations is covered by a
given instrument.

It is to be noted that in the above, and the following
of the circuit is affected.

Respectfully,
[Signature]

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

318 I.A. 637

89

General No. 9385.

Agenda No. 4

THE NORMAL STATE BANK
a banking corporation

Appellant,

-vs-

WILLIAM A. KILLIAN and
ELIZABETH KILLIAN,

Appellees.

Appeal from
Circuit Court
McLean County.

Per curiam:-

The Normal State Bank, of Normal, Illinois, plaintiff and appellant, hereafter referred to as "the bank," obtained a judgment by confession on September 10, 1932, in the circuit court of McLean County, against William A. Killian and Elizabeth Killian, his wife, hereafter referred to as "defendants," for the sum of \$14,413.61. Execution on such judgment issued on September 8, 1939, under which execution a levy was made on the reversionary interest of William A. Killian in all of the real estate owned by his father, Michael Killian, ^{deceased,} at the time of his death.

On September 16, 1939, the defendants filed in the circuit court a written motion to quash the execution and levy. The bank did not file any answer to but did contest the motion. After hearing evidence the circuit court denied the motion to quash the execution, but allowed the motion to quash the levy. The bank appeals from such judgment quashing the levy.

The motion to quash alleged the following:

1. That on January 8, 1933, William A. Killian filed in the United States district court a voluntary petition in bankruptcy, and on the same date was adjudged a bankrupt by such court; that the judgment so entered in the circuit court on September 10, 1932, was entered in the schedule of the bankrupt as an unsecured debt; that thereafter the bank filed in the bankruptcy proceeding its claim based on such judgment, and such claim was allowed; that on January 19, 1933, one Riddle was appointed and qualified as trustee in bankruptcy in such cause.

2. That on April 23, 1936, the district court granted to William A. Killian an order of discharge in bankruptcy, which order (so far as is material) stated, "It is therefore ordered * * * that the said William A. Killian be discharged from all debts and claims which are made provable * * * against his estate, and which existed on the 6th day of January, 1933, * * * excepting such debts as are by law excepted from the operation of the discharge in bankruptcy."

3. That Michael Killian, father of William A. Killian, died on January 1, 1913, seized in fee simple of the real estate in question; that he left a will which was duly admitted to probate in the probate court of McLean County; that the widow of Michael Killian died on August 22, 1939.

4. That William A. Killian in his schedule of assets filed in such bankruptcy proceeding, which purported to describe the property of the bankrupt, "in reversion, remainder or expectancy," and under the heading "interest in land," set forth all of the fifth, eighth, ninth and eleventh paragraphs of the will of Michael Killian.

5. That "thereafter" Riddle, as trustee, filed in the circuit court of McLean County his complaint in which he alleged that all right, title and interest which William ^{A.} Killian acquired by said will was vested in Riddle as such trustee, and asked for a construction of the will and a determination of what rights and interests in the property mentioned in said will passed to Riddle as such trustee; that all of the heirs of Michael Killian were made parties to said proceeding; that on April 27, 1936, a final decree was entered in said circuit court which (so far as is material) found that "the question has arisen as to what interest, if any, the said trustee in bankruptcy took" in and to the real estate described in the fifth paragraph of the will of Michael Killian, deceased, consisting of two hundred acres, "by virtue of certain clauses in the will of Michael Killian, deceased, and by virtue of said adjudication and appointment in bankruptcy," and found that "by proper interpretation of the will * * * the said William A. Killian has a contingent interest in the premises * * * to vest only in the event he survives * * * his mother;" and that said decree ordered, adjudged and decreed "that by a proper construction of the will of said Michael Killian, William A. Killian, bankrupt, has a contingent interest in the real estate" described in the fifth paragraph of such will, "to vest only in the event he survives * * * his mother, in which event he will become vested with an estate for life, * * * and that on January 6, 1933, * * * he had no interest in the said premises which was subject to seizure or sale upon execution or that could have been otherwise transferred;" that such judgment of the circuit court was reviewed and affirmed by the supreme court in Riddle v. Killian, 366 Ill. 394.

[illegible]

6. That on December 3, 1937, the bank filed in said bankruptcy proceeding its petition to have the discharge of William A. Killian set aside and the estate opened, "then and there contending that notwithstanding the decision of the supreme court * * * that the said William A. Killian had such an interest in the lands described in his schedule as would pass to the trustee in bankruptcy, and that a new trustee should be appointed and said premises applied to the payment of the indebtedness of William A. Killian;" that William A. Killian was made respondent, filed his answer to such petition, and on January 5, 1938, an order was entered by the district court which stated that the court "doth find that William A. Killian at the time of the filing of the petition upon which he was adjudged a bankrupt had no such title or interest in and to the property mentioned in said petition to reopen said cause as would pass to a trustee in bankruptcy, and that the same did not constitute assets in said estate, and it is therefore ordered that the petition to reopen, etc., be and the same is hereby denied;" and that the said order of the district court remains in full force and effect.

7. That by virtue of the foregoing proceedings the interests of William A. Killian on September 10, 1932 and January 6, 1933, are as to the bank fully adjudicated and determined and not subject to further review.

The motion to quash set up verbatim the will of Michael Killian, deceased. Inasmuch as the material parts of such will are set up in the case of Riddle v. Killian, ~~Riddle~~ ^{Killian} supra, and inasmuch as the supreme court there said, "until the vesting of the contingent remainder or the determination of the impossibility of its vesting, the reversion in fee descended to the heirs of the testator;" and

The action to enforce the will of Edward Killian, deceased, is brought in and several parts of which are set up in the name of Edward Killian v. ^{Killian} Mary, and the same is the subject of the decision of the United States Supreme Court in the case of Edward Killian v. Mary, 100 U.S. 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 9

inasmuch as the defendants do not on this appeal contend that William A. Killian does not in fact have such contingent remainder, and inasmuch as the bank in its brief in the present case says: "The only interest the bank claims to have reached by the levy under its judgment is such interest as vested in William A. Killian as an heir at law of his deceased father, as distinguished from any interest he took as devisee under his father's will," we do not consider it useful or necessary to here repeat the terms of such will.

It is not claimed that the defendant Elizabeth Killian, ^{Wife of William A. Killian,} has any interest in the real estate other than an inchoate dower interest.

The bank in its brief says "It is fundamental that by going to hearing on the motion to quash, the bank admitted every fact set up in that motion (to quash), but there can be no presumption of facts not set up in that motion."

The bank now contends that the motion to quash is defective and insufficient on its face in that it does not appear therein or thereby that as a matter of fact any court has ever actually had presented to it or has passed upon the question of whether William A. Killian is the owner of the particular interest in the real estate levied upon.

By the motion to quash the defendants contended and now contend that by reason of such court proceedings set forth in said motion, it was duly adjudicated and determined that, upon the death of his father, William A. Killian acquired and had only a reversionary interest in said premises, and it was adjudicated and determined that such reversionary ^{contingent} interest was not subject to seizure or sale on execution, and that such adjudications are res adjudicata.

While, as stated, it appears from the record that evidence was introduced on the hearing on the motion to quash, yet such evidence was not preserved by any report of proceedings.

The motion to quash sets up four different former orders and decrees as being res adjudicata, viz:

1. The decree of the circuit court of McLean County construing the Michael Killian will.
2. The order of the Illinois supreme court affirming such construction decree.
3. The order of the United States district court discharging William A. Killian in bankruptcy.
4. The order of the district court denying the bank's petition to reopen the bankruptcy estate.

As to the effect of the circuit court proceedings, it will be noted that the decree recites that "The question has arisen as to what interest, if any, the trustee in bankruptcy took" in and to the real estate "by virtue of certain clauses of the will of Michael Killian, deceased, and by virtue of such adjudication and appointment in bankruptcy," and finds that "by proper interpretation of the will said William A. Killian has a contingent interest in the premises." By the decree it is then ordered, adjudged and decreed "that by a proper construction of the will * * * William A. Killian, bankrupt, * * * has a contingent interest in such real estate * * *," and "that on January 6, 1933, the date on which he was adjudicated as a bankrupt, he had no interest in the said premises which was subject to seizure or sale upon execution or that could have been otherwise transferred." This was all that such decree found or decreed. We believe that the words "that on January 6, 1933, * * * he had no interest in the said premises which was subject to seizure or sale upon execution," refer back to and by such decree are limited and qualified by the words "that by a proper construction

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

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of the will," and that such decree only found and decreed that by virtue of the will he acquired and had no interest subject to seizure or sale or that could have been transferred. We do not consider such decree to be any finding or adjudication that William did not in fact have a reversionary fee as an heir.

The motion to quash then states that the holding of the supreme court was an express holding that the trustee in bankruptcy "had no interest in the property in controversy." We have carefully read the supreme court opinion and cannot agree with defendants' contention. Defendants call particular attention to the following language in such opinion: "It necessarily follows that on January 8, 1933, the devisee had no interest in the property * * *." The word "devisee" as so used did not mean William ^{A. Killian,} individually. ~~It is our opinion that~~ The decision of the supreme court did not adjudicate beyond affirming the decree of the circuit court.

As to the effect of the order of discharge in bankruptcy entered on April 23, 1936,-- our statute on judgments, executions and decrees (Ch. 77, Sec. 1) provides that: "A judgment of a court of record shall be a lien on the real estate of the person against whom it is obtained * * * from the time the same is rendered * * * for the period of seven years, and no longer; * * * provided * * * When execution is not issued on a judgment within one year from the time the same becomes a lien, it shall thereafter cease to be a lien, but execution may issue upon such judgment at any time within said seven years, and shall become a lien on such real estate from the time it shall be delivered to the sheriff * * * to be executed." Therefore the judgment on which the execution was based became a lien on the reversionary interest in question at the time of the entry of such judgment, and continued to be and was such lien at

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There are no other persons named in the document.

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the time of the appointment and qualification of the trustee in bankruptcy. The bankruptcy proceedings, merely by virtue of their maintenance, did not automatically terminate or void the lien of the bank although such judgment of the state court was entered within four months of the filing of the petition in bankruptcy, but merely made such lien voidable as against the trustee in bankruptcy in a proper suit to be brought by him. (Connell v. Walker, 291 U. S., 1; Taubel v. Fox, 264 U. S., 426; Pigg v. U. S., 81 Fed. (2) 334; In re Graves Estate, 27 Fed. Supp., 717; Leonard v. Springer, 174 Ill. App. 516.)

It is not alleged in the motion to quash and not contended that the trustee took any action to void the lien in question, nor is it alleged or contended that the trustee actually accepted such reversionary interest as a part of the bankrupt estate. A trustee is not bound to accept property which is of an onerous or unprofitable nature and which would burden instead of benefit the estate. When a trustee in bankruptcy ceases to be trustee the title to any property held by him as such trustee passes from him, and if it is not otherwise disposed of it must necessarily then revert to the bankrupt as the original owner, subject to such liens as were valid at the time of the beginning of the bankruptcy proceeding. (Burton v. Perry, 146 Ill. 71; Stipe v. Jefferson, 192 Minn. 504, 257 N.W. 99, Rochester Lbr. Co. v. Locke, 72 N. H. 23, 54 Atl. 705). Defendants have not contended or cited any case to the contrary. From the admitted facts, it follows that William A. Hillian obtained title to this reversionary interest by the death of his father; thereafter the trustee temporarily had such title, subject to the lien in question, which lien has never been voided, and on the

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2. United States is a country of immigrants.
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It is the policy of the United States to support the efforts of the people of the Republic of China to maintain their freedom and independence, and to oppose any attempt to coerce or subvert them. The United States will continue to support the Republic of China as the only government in China which is representative of the Chinese people and which is committed to the principles of democracy and freedom.

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case 397

discharge of the trustee the title reverted to William A. Killian, subject to the right of such bank by virtue of such judgment to have the lien revived by taking out execution.

As to the effect of the proceeding in the district court denying the bank's petition to reopen the bankrupt's estate,- the motion to quash did not plead either in haec verba or in legal effect the petition to have the discharge set aside and the estate reopened. The words "then and there contending that, notwithstanding the decision of the supreme court, * * * the said William A. Killian had such an interest in the land described in his schedule as would pass to the trustee in bankruptcy and that a new trustee should be appointed * * *" do not amount to an allegation that it was set up in the petition that William A. Killian had in fact a reversionary interest, and are at best a mere conclusion of the pleader. It will also be noted that this language refers to the land described in his "schedule." It will also be noted that in such schedule the reversionary interest was not described or referred to. The order of the district court did not find that William Killian did not in fact have such reversionary interest, but such order is in general terms. If defendants claimed that the question of the existence of such reversionary interest was presented to and was adjudicated by the district court, it was incumbent on defendants to specifically allege in the motion to quash that such was the fact. This they avoided by the use of general language. In Cherry v. Aetna Casualty Co., 300 Ill. App. 403, the court said: "Before a fact or question in some former suit can be claimed to be res adjudicata in a subsequent suit, as estoppel by verdict, certain requirements must be shown to exist. When the second suit is on a different cause of action, claim or demand, the

discharge of the trustee the title reverted to William A. Killian, subject to the right of such bank by virtue of such judgment to have the lien revived by taking out execution.

As to the effect of the proceeding in the district court denying the bank's petition to reopen the bankrupt's estate, - the motion to quash did not affect either in any way or in legal effect the petition to have the discharge set aside and the estate reopened. The words "then and there contained" that, notwithstanding the decision of the supreme court, * * * the said William A. Killian had such an interest in the land described in his schedule as would pass to the trustee in bankruptcy and that a new trustee should be appointed * * * do not amount to an allegation that it was set up in the petition that William A. Killian had in fact a reversionary interest, and are at best a mere conclusion of the plaintiff. It will also be noted that this language refers to the land described in his "schedule". It will also be noted that in such schedule the reversionary interest was not described or referred to. The order of the district court did not find that William Killian did not in fact have such reversionary interest, but such order is in general terms. It defendant claimed that the question of the existence of such reversionary interest was presented to and was adjudicated by the district court, it was incumbent on defendant to specifically allege in the motion to quash that such was the fact. This they avoided by the use of general language. In Cherry v. Astor Casualty Co., 300 Ill. App. 403, the court said: "Before a fact or question in some former suit can be claimed to be res adjudicata in a subsequent suit, as estoppel by verdict, certain requirements must be shown to exist. When the second suit is on a different cause of action, claim or demand, the

judgment in the first suit is an estoppel only as to the point or question there actually litigated and determined, and not as to other matters which might have been litigated and determined. The burden of proof is on him who invokes the estoppel. *Harding Co. vs. Harding*, 352 Ill. 417."

We consider it useless to further discuss the effect of such order of the district court for it is stated in defendants' brief, filed in our court, that in fact such question was not presented to the federal court, wherein they say:

"In the proceedings in the United States court appellant (the bank) did not claim * * * that William A. Killian had a 'reversionary' interest in these properties that was subject to levy and sale, but he claimed that William A. Killian's contingent interest notwithstanding the opinion of the supreme court was subject to levy and sale and therefore passed to the Trustee and that this contingent life estate constituted 'all the assets of the estate' which might be used to pay indebtedness,-* * *. After the supreme court had passed upon the question and held that the interest of William A. Killian was a contingent life estate by virtue of the terms of the will and that there would be a reversionary interest in the heirs at law pending the vesting of the estate in accordance with the will, appellant then went into the United States district court. It did not there claim that the interest was a reversionary one, in all of the property, but did claim that the 'contingent life estate' was subject to levy and sale."

Defendants call attention to the following recital in such judgment order appealed from,- "Counsel for both parties having stated that the question as to whether or not William A. Killian had a reversionary interest in the lands

instrument in the first suit is an estoppel only as to the point or question there actually litigated and determined, and not as to other matters which might have been litigated and determined. The burden of proof is on him who invokes the estoppel. *Wardman Co. v. Harding*, 352 Ill. 417.

We consider it useless to further discuss the effect

of such order of the district court for it is stated in the defendants' brief, filed in this court, that in fact such question was not presented to the federal court, wherein they say:

"In the proceedings in the United States court appellant (the bank) did not claim * * * that William A. Killian had a 'reversionary' interest in these properties that was subject to levy and sale, but he claimed that William A. Killian's

contingent interest notwithstanding the opinion of the supreme court was subject to levy and sale and therefore passed to the trustee and that this contingent life estate constituted 'all the assets of the estate' which might be used to pay indebtedness." * * *. After the supreme court had passed upon the question and held that the interest of William A.

Killian was a contingent life estate by virtue of the terms of the will and that there would be a reversionary interest in the heirs at law pending the vesting of the estate in accordance with the will, appellant then went into the United States district court. It did not there claim that the

interest was a reversionary one, in all of the property, but did claim that the 'contingent life estate' was subject to levy and sale."

Defendants call attention to the following recital

in such judgment order appealed from, -- "Conceded for both parties having stated that the question as to whether or not William A. Killian had a reversionary interest in the lands

embraced in the will of Michael Killian was presented to the supreme court in the case of Harry E. Riddle, Trustee, vs. William A. Killian, et al, on the plaintiff's petition for rehearing therein." We consider as being immaterial the fact that such question was so presented on such petition for rehearing. The denial of such petition for a rehearing did not in any way modify the decree of the trial court which was affirmed by the supreme court, and did not adjudicate the question of the existence or nonexistence of such reversionary interest.

The judgment order of the trial court appealed from in the present case contains no finding of facts, except "that the facts set up in said motion of the defendants to quash constitute a complete bar to any further proceedings under the levy made herein." Because of the absence of a report of proceedings on the trial, we are required to and do presume that sufficient evidence was presented to justify such finding of facts, but it is our opinion that the facts well pleaded in such motion and found to be true do not constitute res adjudicata of the present issues.

For the reasons indicated it is our opinion that the trial court erred in quashing the levy.

The judgment of the circuit court of McLean County is reversed and the cause is remanded with directions to the circuit court to enter an order denying the motion to quash the execution and denying the motion to quash the levy.

Reversed and remanded with directions.

embraced in the will of Michael William was presented to the supreme court in the case of Henry A. Riddle, Trustee, vs. William A. William, et al, on the Plaintiff's petition for rehearing therein. "It is considered as being immaterial the fact that such question was so presented on such petition for rehearing. The denial of such petition for a rehearing did not in any way modify the decree of the trial court which was affirmed by the supreme court, and did not adjudge the question of the existence or nonexistence of such reversibly interest.

The judgment order of the trial court appealed from in the present case contains no finding of facts, except "that the facts set up in said motion of the defendants to grant a complete bar to any further proceedings under the levy made herein." Because of the absence of a report of proceedings on the trial, we are required to say no more than sufficient evidence was presented to justify such finding of facts, but it is our opinion that the facts well pleaded in such motion and found to be true do not constitute res nulli facts of the present issues.

For the reasons indicated in our opinion that the trial court erred in granting the levy. The judgment of the circuit court of Nelson County is reversed and the cause is remanded with directions to the circuit court to enter an order denying the motion to grant the execution and denying the motion to grant the levy.

Reversed and remanded with directions.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1942

Abstract

Term No. 42034

Agenda No. 32

THOMAS WILLIAMSON, GEORGE
BURROUGHS and M. L.
BURROUGHS,

Plaintiffs-Appellees

vs.

MILDRED DRAPER,

Defendant-Appellant.

STONE, J.

313 I.A. 637²

Appeal from the
Circuit Court of
Madison County

270

In May 1941, Thomas Williamson, George Burroughs, and M. L. Burroughs, co-partners, appellees, who for convenience will be herein designated as plaintiffs, who are attorneys with offices in Edwardsville, filed suit against Mildred Draper, appellant, who will be herein designated as defendant, before a Justice of the Peace, to recover an attorney fee of \$250.00. There was no defense interposed there by defendant, and judgment was rendered in that court for the amount sued for. Thereafter she prosecuted her appeal to the Circuit Court of Madison County.

The case was set for trial, in that court, for May 12, 1942. Notice of setting of the case for that date, was mailed by the Clerk of the Circuit Court, on April 30, 1942, to Harold J. Bandy, one of the attorneys for defendant. On the day of the trial, defendant failed to appear. The Court dismissed the appeal for want of prosecution, ordered Procedendo to issue, and awarded plaintiffs judgment against defendant for costs. The following day, May 13, 1942, defendant filed her written motion, asking the Court to set aside the order dismissing the appeal and ordering Procedendo to issue because (1) her attorney was engaged in a trial in the Circuit Court of St. Clair County on May 12, 1942, (2) de-

defendant had a complete defense, and (3) defendant is not indebted to plaintiff. To this motion defendant attached the affidavit of Harold J. Bandy, one of her attorneys. On July 16, 1942, defendant filed a supplemental motion to set aside the order dismissing her appeal, to which was attached an affidavit by her. On July 16, 1942, Thomas Williamson, of plaintiffs' firm filed a counter affidavit. On July 17, 1942, the Court denied defendant's motion to set aside the order dismissing appeal and ordering Procedendo, from which order appeal is prosecuted to this Court.

Counsel for defendant in their brief well say, that the question herein involved is not whether or not plaintiff represented defendant in the United States District Court, in which court, the defendant here, was a defendant in a criminal matter in said court, as set forth in the affidavits filed, nor whether plaintiff is entitled to the fee sued for. We therefore deem it unnecessary to here discuss the facts as presented by the affidavits of Harold J. Bandy, and Mildred Draper, in the relationship of attorney and client between Thomas Williamson and Mildred Draper.

Counsel for defendant contend that the only question involved is, did the Circuit Court act arbitrarily and abuse its discretion in denying the prayer of defendant to set aside the order dismissing her appeal and awarding Procedendo with which theory, we are in accord. The affidavit of Harold J. Bandy sets forth the following facts with reference to the setting of the case, and what followed, with reference to notification of the setting, "Harold J. Bandy, first being duly sworn, states that he is attorney for Mildred Draper, above named defendant, in the above entitled cause. Affiant further states that notice of the setting of the above entitled cause for May 12, 1942, was mailed to affiant's office by Simon Kellermann, Clerk of the Circuit Court of Madison County on or about April 30, 1942; that because of the fact that affiant has been continuously engaged in Court in the trial of cases during the past two weeks, the said notice was not called to affiant's atten-

tion, and he did not learn of said setting until the evening of May 12, 1942. Affiant states that during the entire week of May 4, he was engaged in a trial in the Circuit Court of Coles County at Charleston; that on May 11, 1942, he represented the petitioner in a habeas corpus proceeding in the Circuit Court of St. Clair County; that affiant's failure to notify the defendant of the setting of this case for May 12, and to appear for her in this Court for trial was not called to affiant's attention and affiant did not know of said setting." In neither this affidavit, nor in the affidavit of Mildred Draper is there any allegation of due diligence, or of facts from which the trial court might have inferred diligence.

An attorney in a case, where proper process has issued, who is in court, is chargeable with notice of all orders affecting pending causes. 46 C. J. 549; Sovereign Camp W. O. W. vs. Gay 20 Ala. 650, 104 S. 895. It is fundamental that notice to the attorney is notice to the client, and that the neglect of the attorney is the neglect of the client himself and he takes the consequences as though he had been the actor, 6 C. J. 672; Welch vs. Mastin 98 Mo. App. 273, 71 S. W. 1090.

Where an appeal from a Justice of the Peace is dismissed for want of prosecution, it is discretionary with the Court to allow or deny a motion to vacate the order of dismissal, and this Court will not interfere with the exercise of that discretion, except in case of its flagrant abuse. Nispel vs. Wolff 74 Ill. 303; Boyle vs. Levi, 73 id., 176; Kloepfer vs. Osborne, 177 Ill. App. 384. In this case, in the light of the affidavits presented to the trial court, we could hardly say that the court abused its discretion, in refusing to set aside its order dismissing the appeal. The judgment of the Circuit Court of Madison County will be affirmed.

AFFIRMED.

3.

FILED

MAR 2 1943

David B. Mallett
CLERK OF THE APPELLATE COURT
SOUTH DISTRICT OF ILLINOIS

41896

~~CUSHMAN MOTOR DELIVERY CO., a corporation,
for the use of JERSEY INSURANCE COMPANY OF
NEW YORK, a corporation, and CUSHMAN MOTOR
DELIVERY CO., a corporation, for the use
of NORTHERN ASSURANCE COMPANY, LTD., a
corporation, and CUSHMAN MOTOR DELIVERY
CO., a corporation,~~

~~Appellees,~~

~~v.~~

~~MONARK MOTOR FREIGHT SYSTEM, INC., a cor-
poration, and CARL HUG,~~

~~Appellants.~~

318 I.A. 638¹

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

316

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

About 4:30 or 5:00 a.m. on March 20, 1940, a tractor to which a trailer was attached that was owned by plaintiff, Cushman Motor Delivery Co., and operated by one of its servants, collided with a trailer owned by defendant Carl Hug, who was operating same as the agent of defendant Monark Motor Freight System. The collision occurred on U. S. Highway No. 52 about two and one-half miles south of Lebanon, Indiana. The trailer of the Cushman Motor Delivery Company was loaded with galvanized sheet steel. The trailer owned by defendant Hug was loaded with liquor which he was transporting for the defendant Monark Motor Freight System.

As a result of the accident plaintiffs' tractor and trailer and the contents of the latter were completely destroyed by fire. The damage suffered by plaintiff Cushman Motor Delivery Co., to its trailer and tractor was covered in part by an insurance policy issued by the Jersey Insurance Company of New York. The damage to the cargo of galvanized sheet steel being transported in the Cushman company's trailer was covered in part by an insurance policy issued by the Northern Assurance Company, Ltd. Said insurance companies paid the losses suffered by the Cushman Motor Delivery Co. to the extent that their policies covered same and were subrogated to that extent to the claim of the Cushman Company against the defendants. This action was brought against defendants by Cushman Motor Delivery Co., for the use of Jersey Insurance

3181A.638

APPEAL FROM
SUPERIOR COURT
COOK COUNTY

CUSHMAN MOTOR DELIVERY CO., a corporation,
for the use of JERSEY INSURANCE COMPANY OF
NEW YORK, a corporation, and CUSHMAN MOTOR
DELIVERY CO., a corporation, for the use
of NORTHERN ASSURANCE COMPANY, LTD., a
corporation, and CUSHMAN MOTOR DELIVERY
CO., a corporation,

Appellees,

v.

MONARK MOTOR FREIGHT SYSTEM, INC., a cor-
poration, and CARL HUG,

Appellants.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

About 4:30 or 5:00 a.m. on March 20, 1940, a tractor to

which a trailer was attached that was owned by plaintiff, Cushman
Motor Delivery Co., and operated by one of its servants, collided
with a trailer owned by defendant Carl Hug, who was operating same
as the agent of defendant Monark Motor Freight System. The collision
occurred on U. S. Highway No. 52 about two and one-half miles south
of Lebanon, Indiana. The trailer of the Cushman Motor Delivery
Company was loaded with galvanized sheet steel. The trailer owned
by defendant Hug was loaded with liquor which he was transporting
for the defendant Monark Motor Freight System.

As a result of the accident plaintiffs' tractor and trailer
and the contents of the latter were completely destroyed by fire.
The damage suffered by plaintiff Cushman Motor Delivery Co., to
its trailer and tractor was covered in part by an insurance policy
issued by the Jersey Insurance Company of New York. The damage
to the cargo of galvanized sheet steel being transported in the
Cushman company's trailer was covered in part by an insurance
policy issued by the Northern Assurance Company, Ltd. Said insur-
ance companies paid the losses suffered by the Cushman Motor Delivery
Co. to the extent that their policies covered same and were subro-
gated to that extent to the claim of the Cushman Company against
the defendants. This action was brought against defendants by
Cushman Motor Delivery Co., for the use of Jersey Insurance

Company of New York and for the use of Northern Assurance Company, Ltd., and in its own behalf for its alleged damages over and above the amounts of insurance or indemnity paid by such insurance companies.

Defendants Monark Motor Freight System and Carl Hug filed a joint counterclaim seeking compensation for damages alleged to have been suffered by them by reason of the collision.

The case was tried by the court without a jury. The court found defendants guilty and assessed plaintiffs' damages as follows: "Jersey Insurance Co. of New York, a corporation.....\$1,217.50; Northern Assurance Co., Ltd., of London, England, a corporation, \$650.37; Cushman Motor Delivery Co.....\$642.44." Judgment was entered in favor of the respective plaintiffs and against the defendants for damages in the foregoing amounts. Plaintiffs were found not guilty as to defendants' counterclaim and judgment was entered in their favor on such finding. Defendants appeal from said judgments.

Hereinafter for convenience the tractor-trailer of the Cushman Motor Delivery Co. will besometimes referred to as belonging to plaintiffs and Hug's tractor-trailer as belonging to defendants.

Plaintiffs' complaint alleged substantially that the operator of their tractor-trailer was in the exercise of ordinary care for the safety of same and for the safety of others; that as he drove said tractor-trailer north on U. S. Highway No. 52 at the time and place in question in the most easterly lane of said highway "the tractor and trailer of the plaintiffs and the tractor and trailer of the defendants came in violent contact and collision with each other" by reason of defendants' negligence; that defendants' negligence consisted principally in their failure to comply with certain provisions of the Motor Vehicle Act of Indiana.

Defendants' answer denied the material allegations of the complaint.

Defendants' counterclaim alleged that Hug was in the

Company of New York and for the use of Northern Assurance Company, Ltd., and in its own behalf for its alleged damages over and above the amounts of insurance or indemnity paid by such insurance companies.

Defendants Monark Motor Freight System and Carl Hag filed a joint counterclaim seeking compensation for damages alleged to have been suffered by them by reason of the collision. The case was tried by the court without a jury. The court found defendants guilty and assessed plaintiffs' damages as follows:

"Jersey Insurance Co. of New York, a corporation.....\$1,217.50;
Northern Assurance Co., Ltd., of London, England, a corporation.....\$650.37; Guahman Motor Delivery Co.....\$642.44." Judgment was entered in favor of the respective plaintiffs and against the defendants for damages in the foregoing amounts. Plaintiffs were found not guilty as to defendants' counterclaim and judgment was entered in their favor on such finding. Defendants appeal from said judgments.

Hereinafter for convenience the tractor-trailer of the Guahman Motor Delivery Co. will be sometimes referred to as belonging to plaintiffs and Hag's tractor-trailer as belonging to defendants. Plaintiffs' complaint alleged substantially that the operator

of their tractor-trailer was in the exercise of ordinary care for the safety of same and for the safety of others; that as he drove said tractor-trailer north on U. S. Highway No. 52 at the time and place in question in the most easterly lane of said highway "the tractor and trailer of the plaintiffs and the tractor and trailer of the defendants came in violent contact and collision with each other" by reason of defendants' negligence; that defendants' negligence consisted principally in their failure to comply with certain provisions of the Motor Vehicle Act of Indiana.

Defendants' answer denied the material allegations of the complaint. Defendants' counterclaim alleged that Hag was in the

exercise of ordinary care in the operation of his tractor-trailer; that "plaintiffs operated said [their] motor vehicle in a negligent and reckless manner. That they negligently operated their motor vehicle at an excessive and dangerous rate of speed in violation of the Statutes of the State of Indiana, in such cases made and provided. That they negligently failed to reduce the speed of said motor vehicle when danger to the plaintiff was imminent. That they negligently failed to pull out or turn their motor vehicle to the left in order to avoid striking the trailer of the defendants, when there was ample and sufficient room so to do. That the plaintiffs drove and caused to be propelled their motor vehicle with defective brakes, and were unable to slacken or reduce the speed of said motor vehicle, due to the condition of said brakes. That they negligently failed to obey the warning signals which were then and there present and in full view of the plaintiffs. That the plaintiffs failed to equip their motor vehicle with proper driving lights sufficient to light up the roadway whereupon the plaintiffs were traveling. That the plaintiffs negligently failed to keep a proper lookout for other traffic in and upon said highway then and there lawfully present;" and that "as a direct and proximate result of the negligence of the plaintiffs, the trailer of the defendants was greatly damaged."

For a clearer understanding of the questions involved it is necessary to set forth the material portions of the testimony of all the witnesses.

Carl Hug, one of the defendants, called as an adverse witness by plaintiffs, testified that on March 20, 1940, he was driving a tractor-trailer north on U. S. Highway No. 52, two and one-half miles south of Lebanon, Indiana; that he was obliged to park his trailer on the highway by reason of the fact that the tires on the two left rear wheels of his tractor went flat, dropping said wheels to the pavement; that he was unable to pull the trailer because of this condition; that when he parked his trailer, about one-half of it was on the berm or shoulder of the highway and the other half was

exercise of ordinary care in the operation of his tractor-trailer;
that "plaintiffs asserted said [their] motor vehicle in a negligent
and reckless manner. That they negligently operated their motor
vehicle at an excessive and dangerous rate of speed in violation of
the statutes of the State of Indiana, in such cases made and provided.
That they negligently failed to reduce the speed of said motor vehicle
when danger to the plaintiff was imminent. That they negligently
failed to pull out or turn their motor vehicle to the left in order
to avoid striking the trailer of the defendants, when there was ample
and sufficient room so to do. That the plaintiffs drove and caused
to be propelled their motor vehicle with defective brakes, and were
unable to slacken or reduce the speed of said motor vehicle, due
to the condition of said brakes. That they negligently failed to
obey the warning signals which were then and there present and in
full view of the plaintiffs. That the plaintiffs failed to equip
their motor vehicle with proper driving lights sufficient to light
up the roadway whereupon the plaintiffs were traveling. That the
plaintiffs negligently failed to keep a proper lookout for other
traffic in and upon said highway then and there lawfully present;
and that "as a direct and proximate result of the negligence of the
plaintiffs, the trailer of the defendants was greatly damaged."
For a clearer understanding of the questions involved it is
necessary to set forth the material portions of the testimony of all
the witnesses.
Carl Hug, one of the defendants, called as an adverse witness
by plaintiffs, testified that on March 20, 1940, he was driving a
tractor-trailer north on U. S. Highway No. 25, two and one-half miles
south of Lebanon, Indiana; that he was obliged to park his trailer
on the highway by reason of the fact that the tires on the two left
rear wheels of his tractor went flat, dropping said wheels to the
pavement; that he was unable to pull the trailer because of this
condition; that when he parked his trailer, about one-half of it
was on the berm or shoulder of the highway and the other half was

on the most easterly lane of the highway; that when he disengaged the tractor from the trailer all of the lights on the trailer were extinguished except two oil lanterns which he had placed "one on each side of the corner on the rear" before he left Louisville, Kentucky; that these two oil lanterns were about 7 or 8 feet from the ground; that as soon as he pulled to a stop because of the flat tires on the tractor he placed flares and pot torches out around the parked trailer; that he placed one pot torch "about 150 steps in the rear and one of them right by the rear corner of the trailer and one by the front corner of the trailer, and the other one about 150 foot in front of the trailer;" that he then proceeded to Lebanon with his tractor to have its flat tires repaired; and that it was not raining at the time he parked his trailer and it was "breaking day."

Alfred Carson testified that he was employed by plaintiff Cushman Motor Delivery Co., as a truck driver; that on the morning in question he was driving plaintiffs' tractor-trailer north on U. S. Highway No. 52 about a mile or a mile and one-half south of Lebanon; that when he first noticed defendants' trailer parked on the highway he was approximately 120 feet to the rear of same; that when he saw the trailer he was too close to it to stop or turn to the left to pass it; that the right front corner of his tractor struck the left rear corner of the parked trailer; that it had been misty but it was not raining at the time of the accident; that "my head lights were lit *** on bright;" that as he approached the trailer he did not see any lights or smudge pots in the road; that "after I got out of my truck, I went over to the trailer and I found two pots, one at the corner of the back and one at the front corner *** they were not lit;" that there were no lanterns or lights on the rear end of the trailer; that defendants' trailer "was parked right on the pavement;" that he was traveling "around 30 miles an hour;" that when he first saw the trailer he swung his truck "to the left to keep from hitting head on *** I do not believe I could have

on the most easterly lane of the highway; that when he disengaged the tractor from the trailer all of the lights on the trailer were extinguished except two oil lanterns which he had placed "one on each side of the corner on the rear" before he left Louisville, Kentucky; that these two oil lanterns were about 7 or 8 feet from the ground; that as soon as he pulled to a stop because of the flat tires on the tractor he placed flares and pot torches out around the parked trailer; that he placed one pot torch "about 150 steps in the rear and one of them right by the rear corner of the trailer and one by the front corner of the trailer, and the other one about 150 feet in front of the trailer;" that he then proceeded to Lebanon with his tractor to have its flat tires repaired; and that it was not raining at the time he parked his trailer and it was "drizzling day."

Alfred Carson testified that he was employed by plaintiff Cushman Motor Delivery Co., as a truck driver; that on the morning in question he was driving plaintiff's tractor-trailer north on U. S. Highway No. 52 about a mile or a mile and one-half south of Lebanon; that when he first noticed defendant's trailer parked on the highway he was approximately 150 feet to the rear of same; that when he saw the trailer he was too close to it to stop or turn to the left to pass it; that the right front corner of his tractor struck the left rear corner of the parked trailer; that it had been misty but it was not raining at the time of the accident; that "my head lights were lit *** on bright;" that as he approached the trailer he did not see any lights or smudge pots in the road; that "after I got out of my truck, I went over to the trailer and I found two pots, one at the corner of the back and one at the front corner *** they were not lit;" that there were no lanterns or lights on the rear end of the trailer; that defendant's trailer "was parked right on the pavement;" that he was traveling "around 30 miles an hour;" that when he first saw the trailer he swung his truck "to the left to keep from hitting head on *** I do not believe I could have

stopped in time to keep from hitting it;" that plaintiffs' tractor and trailer "caught fire and burned completely up," destroying his cargo of sheet steel; and that he applied his brakes "some, but I did not want to stop too quick because I did not want that steel in my back."

Christopher Williams Knauer testified that about 3:45 a. m. on the morning of March 20, 1940, he was driving a truck in a northerly direction on U. S. Highway No. 52; that when he was about two or two and one-half miles south of Lebanon, Indiana, he "saw a red corrugated trailer that had two pot torches, one practically out, and the other one was burning a little bit *** the one that was practically out was setting at the left rear corner of the trailer;" that the one that was burning was at the left front corner of the trailer; that the trailer was parked "in the righthand lane, a three lane road ***;" that it was parked "entirely on the concrete" and that there was no portion of it "on the shoulder or the berm;" that as he passed the parked trailer "it was kind of misty *** it had been raining, awfully windy" and the road was wet; that "there were no lights that I saw on the rear end of the trailer or on the trailer at all;" that he saw the entire rear end of the trailer as he passed it and that if there were any coal oil lanterns on said rear end "they were not burning;" that as he passed the rear end of the trailer he saw no clearance lamps, no reflectors, "no lights at all;" that when he first recognized the trailer parked on the highway as he was driving north, he was approximately 75 yards to the south of it; that he noticed that there were lighted pot torches set on the highway as he approached the parked trailer and passed it; that he was traveling at a speed of about 35 miles an hour when he passed said trailer.

Everett F. Shepard testified that he left Lebanon, Indiana, at 4 a. m. on the morning in question and drove south on U. S. Highway No. 52; that "about four miles south of Lebanon" he saw "a trailer

stopped in time to keep from hitting it;" that plaintiff's tractor and trailer "caught fire and burned completely up," destroying his cargo of sheet steel; and that he applied his brakes "some," but I did not want to stop too quick because I did not want that steel in my back."

Christopher Williams Knaus testified that about 3:45 a.m. on the morning of March 20, 1940, he was driving a truck in a northerly direction on U. S. Highway No. 52; that when he was about two or two and one-half miles south of Lebanon, Indiana, he "saw a red corrugated trailer that had two hot torches, one practically out, and the other one was burning a little bit *** the one that was practically out was sitting at the left rear corner of the trailer;" that the one that was burning was at the left front corner of the trailer; that the trailer was parked "in the right-hand lane, a three lane road ***;" that it was parked "entirely on the concrete" and that there was no portion of it "on the shoulder or the dirt;" that as he passed the parked trailer "it was kind of misty *** it had been raining, awfully windy" and the road was wet; that "there were no lights that I saw on the rear end of the trailer or on the trailer at all;" that he saw the entire rear end of the trailer as he passed it and that if there were any coal oil lanterns on said rear end "they were not burning;" that as he passed the rear end of the trailer he saw no clearance lamps, no reflectors, "no lights at all;" that when he first recognized the trailer parked on the highway as he was driving north, he was approximately 75 yards to the south of it; that he noticed that there were lighted hot torches set on the highway as he approached the parked trailer and passed it; that he was traveling at a speed of about 35 miles an hour when he passed said trailer.

Everett W. Shepard testified that he left Lebanon, Indiana, at 4 a.m. on the morning in question and drove south on U. S. Highway No. 52; that "about four miles south of Lebanon" he saw "a trailer

setting on the highway with no tractor under it;" that there were no lights about the trailer and that there were no pot torches at or near the trailer "that were lit;" that "it had been raining before that but it was not raining at that time *** the concrete was wet;" that the parked trailer was "in the outside lane heading north" with all of its wheels on the concrete; and that he did not see "any lights of any kind on the rear end of that trailer."

In addition to Carl Hug's testimony, heretofore set forth, he further testified that he parked one wheel of the trailer off the pavement; that the inside tire on the left rear dual tractor wheel went flat and the other tire blew out; and that he could not pull the trailer because of the two flat tires on the tractor.

Marion Baringer testified that he was employed in the uniform division of the Indiana State Police Department; that he received a call from the sheriff's office between 5:00 and 5:30 a.m. on March 20, 1940; that he made an investigation of the accident and learned that "defendants' equipment" had been struck by plaintiffs' tractor; that the front of the parked trailer had been driven into and against a clump of trees; that plaintiffs' truck and trailer were on the opposite side of the road burning; that he talked with defendant Hug, who told him that a tire had blown out on his tractor, that he had uncoupled same from his trailer and that he had driven the tractor into Lebanon to make the necessary repairs; that he had a conversation with Carson, the driver of plaintiffs' tractor, in the presence of Sheriff Patterson, and that Carson stated "that he was driving north on 52 and that he was tinkering with his heater and when he looked up this parked trailer was in front of him, and he swerved sharply to the left to avoid hitting it and the right front of the tractor crashed into the rear end of the parked trailer;" and that Carson also stated that he was driving "approximately between forty and forty-five miles an hour."

David Ray Patterson testified that he was the sheriff of

setting on the highway with no tractor under it; that there were no lights about the trailer and that there were no pot torches at or near the trailer "that were lit; that "it had been raining before that but it was not raining at that time *** the concrete was wet; that the parked trailer was "in the outside lane heading north" with all of its wheels on the concrete; and that he did not see "any lights of any kind on the rear end of that trailer."

In addition to Carl May's testimony, heretofore set forth, he further testified that he parked one wheel of the trailer off the pavement; that the inside tire on the left rear dual tractor wheel went flat and the other tire blew out; and that he could not pull the trailer because of the two flat tires on the tractor.

Marion Baringer testified that he was employed in the uniform division of the Indiana State Police Department; that he received a call from the sheriff's office between 5:00 and 5:30 a.m. on March 20, 1940; that he made an investigation of the accident and learned that "defendants' equipment" had been struck by plaintiffs' tractor; that the front of the parked trailer had been driven into and against a clump of trees; that plaintiffs' truck and trailer were on the opposite side of the road burning; that he talked with defendant May, who told him that a tire had blown out on his tractor, that he had uncoupled same from his trailer and that he had driven the tractor into Lebanon to make the necessary repairs; that he had a conversation with Carson, the driver of plaintiffs' tractor, in the presence of Sheriff Patterson, and that Carson stated "that he was driving north on 52 and that he was tinkering with his heater and when he looked up this parked trailer was in front of him, and he swerved sharply to the left to avoid hitting it and the right front of the tractor crashed into the rear end of the parked trailer;" and that Carson also stated that he was driving "approximately between forty and forty-five miles an hour."

David Ray Patterson testified that he was the sheriff of

Boone County, Indiana; that he received a call on March 20, 1940, concerning the accident in which plaintiffs' and defendants' "trucks" were involved; that he made an investigation; that he identified Carson in the court room as the driver of plaintiffs' truck with whom Baringer had talked concerning the accident; that Carson "made the statement that he was having trouble with the heater on his truck and he had leaned over and was tinkering with the heater or something, and when he looked up the other truck was right in front of him, the trailer;" and that Carson also said that he was traveling "around forty miles, I believe, between forty and forty-five miles an hour."

John Souders testified by deposition that he was a farmer; that he resided about two and one-half miles south of Lebanon, Boone County, Indiana; that about 4:45 a.m. on March 20, 1940, he saw one flare and that was in the rear of the parked trailer; that he was about 350 to 400 feet from the point where defendants' trailer was parked; that as he was walking in a westerly direction from his house to his barn about 45 minutes prior to the accident, his attention was called to the flare placed near the parked trailer; that at that time he saw the outline of the trees along side of the road as well as an outline of the trailer; that said trailer was on the east side of the highway facing north; that the visibility was clear; that the highway was approximately 30 feet wide; that it was straight for a half mile in either direction from the parked trailer; that he could see the rear end of the trailer; that after the crash or collision occurred it was beginning to break daylight; that there was no fog; and that "the shoulder or berm of the road was too soft to bear up under a loaded trailer.

Robert Bower testified by deposition that he was a farmer and that he resided about two miles south of Lebanon, Boone County, Indiana; that he left his house about 4:20 a.m. on the morning of March 20, 1940; that as he walked across the roadway to his farm he noticed defendants' trailer parked on the highway; that it was

Boone County, Indiana; that he received a call on March 20, 1940,

concerning the accident in which plaintiffs' and defendants'

"trucks" were involved; that he made an investigation; that he

identified Carson in the court room as the driver of plaintiffs'

truck with whom Baringer had talked concerning the accident; that

Carson "made the statement that he was having trouble with the

heater on his truck and he had leaned over and was tinkering with

the heater or something, and when he looked up the other truck was

right in front of him, the trailer;" and that Carson also said that

he was traveling "around forty miles, I believe, between forty and

forty-five miles an hour."

John Bowers testified by deposition that he was a farmer;

that he resided about two and one-half miles south of Lebanon, Boone

County, Indiana; that about 4:45 a.m. on March 20, 1940, he saw one

flare and that was in the rear of the parked trailer; that he was

about 350 to 400 feet from the point where defendants' trailer was

parked; that as he was walking in a westerly direction from his house

to his barn about 45 minutes prior to the accident, his attention was

called to the flare placed near the parked trailer; that at that

time he saw the outline of the trees along side of the road as well

as an outline of the trailer; that said trailer was on the east side

of the highway facing north; that the visibility was clear; that

the highway was approximately 30 feet wide; that it was straight

for a half mile in either direction from the parked trailer; that

he could see the rear end of the trailer; that after the crash

or collision occurred it was beginning to break daylight; that there

was no fog; and that "the shoulder or barn of the road was too soft

to bear up under a loaded trailer.

Robert Bower testified by deposition that he was a farmer

and that he resided about two miles south of Lebanon, Boone County,

Indiana; that he left his house about 4:20 a.m. on the morning of

March 20, 1940; that as he walked across the roadway to his farm

he noticed defendants' trailer parked on the highway; that it was

dark at the time; that "there were two flares set out; that one of the flares was in front of the parked trailer and the other one was placed to the rear of same; that the highway is 30 feet wide; that there were three paved traffic lanes; that he went into the barn and came out for his milking equipment at approximately 4:45 a.m.; that at that time a southbound automobile was passing the parked trailer and he could see the outline of same as well as the lighted flares; that the accident occurred between 5:00 and 5:30 a.m.; that his attention was directed to same when he looked out of the barn window and saw the fire; that then "it was just breaking day, but wasn't real dark;" that under normal conditions the shoulder of the road was solid; that he was not certain whether it had been raining that night or not; that a heavy load on the trailer would sink in the shoulder of the road; and that while he had seen the trailer that morning he might not be able to determine what it was at a distance of 150 feet without the aid of artificial light.

Alfred Carson, the driver of plaintiffs' tractor-trailer, testified on rebuttal that he did not make the statements after the accident attributed to him by Marion Baringer, the Indiana State policeman and David Ray Patterson, the sheriff of Boone county, Indiana.

Paragraphs 2120 and 2237 as well as other paragraphs of the Indiana Motor Vehicle Act (chap. 47, Art. XIV, Burns Annotated Statutes of the State of Indiana) were offered and received in evidence. The applicable provisions of par. 2237 are as follows:

"Display of warning devices when vehicle disabled.

(a) Whenever any motor truck, passenger bus, truck tractor, trailer, semitrailer, or pole trailer is disabled upon the traveled portion of any highway or the shoulder thereof outside of any municipality at any time when lighted lamps are required on vehicles, the driver of such vehicle shall display the following warning devices upon the highway during the time the vehicle is so disabled on the highway ***.

"1. A lighted fusee shall be immediately placed on

dark at the time; that "there were two flares set out; that one of the flares was in front of the parked trailer and the other one was placed to the rear of same; that the highway is 30 feet wide; that there were three paved traffic lanes; that he went into the barn and came out for his milking equipment at approximately 4:45 a.m.; that at that time a southbound automobile was passing the parked trailer and he could see the outline of same as well as the lighted flares; that the accident occurred between 5:00 and 5:30 a.m.; that his attention was directed to same when he looked out of the barn window and saw the fire; that then "it was just breaking day, but wasn't real dark;" that under normal conditions the shoulder of the road was solid; that he was not certain whether it had been raining that night or not; that a heavy load on the trailer would sink in the shoulder of the road; and that while he had seen the trailer that morning he might not be able to determine what it was at a distance of 150 feet without the aid of artificial light.

Alfred Carson, the driver of plaintiff's tractor-trailer, testified on rebuttal that he did not make the statements after the accident attributed to him by Marion Baringer, the Indiana State policeman and David Ray Patterson, the sheriff of Boone county, Indiana.

Paragraphs 2120 and 2237 as well as other paragraphs of the Indiana Motor Vehicle Act (chap. 47, Art. XIV, Burns Anno- tated Statutes of the State of Indiana) were offered and received in evidence. The applicable provisions of par. 2237 are as follows:

"Display of warning devices when vehicle disabled.
(a) Whenever any motor truck, passenger bus, truck tractor, trailer, semitrailer, or pole trailer is disabled upon the traveled portion of any highway or the shoulder thereof, outside of any municipality at any time when lighted lamps are required on vehicles, the driver of such vehicle shall display the following warning devices upon the highway during the time the vehicle is so disabled on the highway ***"

"1. A lighted fusee shall be immediately placed on

the roadway at the traffic side of the motor vehicle, unless electric lanterns are displayed.

"2. Within the burning period of the fusee and as promptly as possible, three (3) lighted flares (pot torches) or three (3) electric lanterns shall be placed on the roadway as follows:

"One at a distance of not less than one hundred (100) feet in advance of the vehicle, one (1) at a distance of not less than one hundred (100) feet to the rear of the vehicle, each in the center of the lane of traffic occupied by the disabled vehicle and one (1) at the traffic side of the vehicle."

Paragraph 2120 of the foregoing chap. 47 provides in part as follows:

"Stopping, standing, or parking outside of business or residence districts. (a) Upon any highway outside of a business or residence district, no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main traveled part of the highway when it is practicable to stop, park or so leave such vehicle off such part of said highway, but in every event, a sufficient unobstructed width of the roadway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle shall be available from a distance of two hundred (200) feet in each direction upon such highway.

(b) This section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position."

Defendants' theory as stated in their brief is that Hug's trailer "was parked on the extreme outer right-hand side of the paved portion of a thirty-foot concrete highway and that there were pot torches, fusees, and coal oil lanterns hanging on the rear of said trailer; and that the plaintiff could, by the exercise of ordinary care and the use of his own headlights, have seen and avoided striking the defendants' equipment."

Plaintiffs' theory is that "the evidence as a matter of law and of fact proved the defendants guilty of negligence and the plaintiff, Cushman Motor Delivery Co., free from contributory negligence;" that "the evidence clearly entitled the plaintiff to the findings of the court and the judgments thereof; and that "the Appellate Court will not disturb the judgments of nisi prius court unless the same are clearly and manifestly against

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(b) This section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position."

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Plaintiff's theory is that "the evidence as a matter of law and of fact proved the defendants guilty of negligence and the plaintiff, Graham Motor Delivery Co., free from contributory negligence;" that "the evidence clearly entitled the plaintiff to the findings of the court and the judgments thereon; and that "the Appellate Court will not disturb the judgments of the trial court unless the same are clearly and manifestly against

the weight of the evidence."

The sole ground for reversal urged by defendants is that "the trial court erred in not finding against the plaintiffs and for the defendants as a matter of law." Their position in this regard is untenable because there is evidence in the record which shows or tends to show that the driver of defendants' tractor was negligent in that he failed to comply with provisions of the Indiana statutes which required the placing of lights, lanterns or torches in specified positions "as warning devices when a vehicle is disabled;" that the negligence of said driver was the proximate cause of the collision; and that the driver of plaintiffs' tractor was not guilty of contributory negligence.

Neither can it be said that the findings and judgments of the trial court were against the manifest weight of the evidence. The evidence presented upon the trial was conflicting on both the question as to whether the defendants were guilty of the negligence charged and the question as to whether plaintiffs' driver was free from contributory negligence. It was the province of the trial judge to determine the credibility of the witnesses and the weight to be given their testimony and to ultimately conclude whether the evidence preponderated in favor of plaintiffs or defendants. The trial judge saw and heard the witnesses with the exception of the two who testified by deposition. He had an opportunity, which we do not have, to observe their conduct and demeanor while testifying. Unless the findings and judgments of the trial court are clearly and manifestly against the weight of the evidence they should not be disturbed. In our opinion there was sufficient evidence to justify the trial court's findings and judgments.

For the reasons stated herein the judgments of the Superior court of Cook county are affirmed.

JUDGMENTS AFFIRMED.

Friend and Scanlan, JJ., concur.

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For the reasons stated herein the judgments of the superior

court of Cook county are affirmed.

JUDGMENTS AFFIRMED.

Friend and Scamler, JJ., concur.

41946

ANNIE METZGER,
Appellee,

v.

FRED B. TIDD,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

318 I.A. 638

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Annie Metzger, procured a judgment for \$2,368.66 and costs against defendant, Fred B. Tidd, on March 2, 1931. She filed a complaint against defendant on October 4, 1939 to revive said judgment alleging that same had not been paid and was then in full force and effect. A writ of scire facias to revive the judgment was issued and served upon defendant. He filed his appearance and demand for jury on January 2, 1940 and on the same day filed his answer which alleged that "the said Judgment was discharged, compromised and settled by agreement of the parties subsequent to the rendition thereof and that therefore the plaintiff is not entitled to have the aforesaid Judgment revived." The cause was tried before the court and a jury and at the close of defendant's evidence in support of his affirmative defense the trial court, on plaintiff's motion, directed the jury to find the issues for plaintiff. Pursuant to such direction the jury returned a verdict finding the issues in favor of plaintiff and judgment was entered thereon reviving the original judgment of March 2, 1931 for \$2,368.66 and costs. Defendant appeals from this judgment.

Tidd, who was the only witness in his own behalf, testified that in 1933 he had conversations with plaintiff in the anteroom to Judge Sabath's courtroom and in the corridor just outside of such courtroom in which plaintiff said that they (supposedly plaintiff, plaintiff's husband and plaintiff's daughter, who was then defendant's wife) were tired of the divorce proceedings then pending before Judge Sabath, wherein

divorce proceedings then pending before Judge Sabath, wherein daughter, who was then defendant's wife) were tried of the (supposedly plaintiff, plaintiff's husband and plaintiff's outside of such courtroom in which plaintiff said that they anteroom to Judge Sabath's courtroom and in the corridor that tied that in 1933 he had conversations with plaintiff in the Tidd, who was the only witness in his own behalf, testi-

and costs. Defendant appeals from this judgment, reviving the original judgment of March 2, 1931 for \$2,368.66 issues in favor of plaintiff and judgment was entered thereon amount to such direction the jury returned a verdict finding the motion, directed the jury to find the issues for plaintiff. Pursupport of his affirmative defense the trial court, on plaintiff's court and a jury and at the close of defendant's evidence in the aforesaid judgment revived." The cause was tried before the thereof and that therefore the plaintiff is not entitled to have settled by agreement of the parties subsequent to the rendition alleged that "the said judgment was discharged, compromised and January 2, 1940 and on the same day filed his answer which defendant. He filed his appearance and demand for jury on facies to revive the judgment was issued and served upon paid and was then in full force and effect. A writ of scire 1939 to revive said judgment alleging that same had not been 2, 1931. She filed a complaint against defendant on October 4, \$2,368.66 and costs against defendant, Fred B. Tidd, on March

Plaintiff, Annie Metzger, procured a judgment for

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

3131 A. 688

COOK COUNTY.

APPEAL FROM SUPERIOR COURT.

ANNE METZGER, Appellee,
v.
FRED B. TIDD, Appellant.

41946

defendant was seeking a divorce and his wife was asking for separate maintenance, and that they wanted defendant to withdraw his suit for divorce and permit his wife to get a divorce on the ground of desertion.

Defendant was then asked the following questions by his attorney on direct examination and he made the following answers:

"Q. What, if anything, was said in relation to alienation of affections? A. That I was preparing a case on alienation of affections in the taking of my wife out of the house, and that I would withdraw that case or not file the suit on it. Q. Now, in this conversation, what was said about this judgment against you in case No. 484441 pending in the Superior Court? A. They didn't expect to get it. Mrs. Metzger didn't expect to get it; didn't care whether they ever did; and they wanted to get rid of the case and get rid of me. Q. They wanted to get rid of what case, Mr. Tidd? A. This divorce case. Q. And now, what, if anything, further was said there, Mr. Tidd? A. I said I would withdraw my divorce suit and let her get a divorce on desertion, and also not file suit on the alienation of affections. Q. And then what did Mrs. Metzger say? A. She would be very glad to get rid of it."

Defendant testified that practically the same thing was said in both conversations. He further testified that he withdrew his suit for divorce; that his wife procured a divorce from him on the ground of desertion; and that he did not commence a suit for alienation of affections against plaintiff.

Defendant testified on cross-examination that he and his wife separated in 1924; that he filed a bill for divorce in 1926 charging desertion and that his wife had left him because of her fault and not his; that his wife had filed a cross bill for separate maintenance claiming that he had failed to support her and the children; that as a result of his conversations with plaintiff in 1933 he agreed to drop his suit for divorce and further agreed that his wife might procure a divorce from him on the ground of desertion,

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although he had not deserted her; and that pursuant to such agreement he did not contest his wife's complaint for divorce and she was permitted to procure a divorce from him by default.

After defendant rested his case and plaintiff moved that the jury be directed to find the issues for plaintiff the court made the following statement:

"The plaintiff, at the close of defendant's evidence, having made a motion that the Court instruct the jury to find the issues for the plaintiff, for reasons, among others, that by the defendant's own testimony, at least part of the consideration for the alleged agreement to satisfy the judgment in question was based upon an agreement to withdraw a valid suit for divorce and permit a divorce to be obtained by his wife upon a fraudulent ground and without merit, which is contrary to public policy and public morals, and the Court being of the opinion that that objection is well taken, that at least a part of the consideration for said agreement is illegal and fraudulent and that the consideration can not be divided and separated, the Court feels that it is obliged to so instruct the jury, and it thereupon becomes the duty of the jury to return a verdict as directed."

It will be noted that plaintiff procured her original judgment against defendant in 1931 and that his alleged agreement with her, whereby he claims she discharged him from the payment of said judgment, was made in 1933. Defendant asserts that under said agreement the consideration on his part for his release by plaintiff from payment of the original judgment was twofold: (1) that he withdraw his suit for divorce and permit his wife to procure an uncontested divorce on grounds which were admittedly fraudulent and (2) that he would forbear bringing an action against plaintiff, who was his wife's mother, for alienation of her affections, which he had threatened to do. Defendant contends that "the agreement to forbear the law suit for alienation of affections is separate and distinct, and had nothing to do with any agreement relative to the divorce; that the said agreement was in consideration of a discharge or satisfaction of the instant suit sought to be revived, and as such was a good consideration." In support of this contention defendant cites and relies principally upon Huber v. Culp, 46 Okla. 572. The facts in that case are not comparable with the facts here but, even though they were, it is unnecessary

although he had not asserted her; and that pursuant to such agreement he did not contest his wife's complaint for divorce and she was permitted to procure a divorce from him by default. After defendant rested his case and plaintiff moved that the jury be directed to find the issues for plaintiff the court made the following statement:

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to consider that decision in view of the fact that the Supreme court of this State has repeatedly held that "nothing is better settled in the law of contracts than that if any part of the consideration upon which a promise rests is illegal the entire promise fails." Estate of Ramsay v. Whitbeck, 183 Ill. 550.

In Henderson v. Palmer, 71 Ill. 579, the court said at p. 583:

"As a general rule, if any part of an entire consideration for a promise, or any part of an entire promise, be illegal, whether by statute or at common law, the whole contract is void. 'If a part of the consideration is illegal, the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise another which is legal.' Parsons on Contracts, vol. 1, p. 380. And it is believed that he announces the well recognized rule of the common law."

In Vock v. Vock, 365 Ill. 432, the court said at p. 434:

"The invalid provision is inseparable from any other provision of the contract and was so material a consideration that it renders the entire contract invalid, under the long established rule that if any part of the entire consideration for a contract is illegal, the whole contract is void. That which is bad destroys that which is good and both perish together. Lyons v. Schanbacher, 316 Ill. 569; First National Bank v. Miller, 235 Ill. 135; Douthart v. Congdon, 197 Ill. 349."

(To the same effect are Nash v. Monheimer, 20 Ill. 215; Tenney v. Foote, 95 id. 99; Tobey v. Robinson, 99 id. 222.)

Since defendant's promise to plaintiff that he would permit his wife to secure a divorce on fraudulent grounds was illegal and against public policy and since it was part of the same alleged transaction in which he claims that he agreed with plaintiff that he would not proceed with his threatened suit against her for alienation of his wife's affections in consideration of her promise to discharge him from payment of the original judgment, "the invalid provision is inseparable from any other provision of the contract," Vock v. Vock, *supra*, and the "bad destroys that which is good and both perish together." Lyons v. Schanbacher, 316 Ill. 569. Thus the flimsy defense interposed in this case to the revival of the judgment did not constitute a legal defense and the trial court properly directed the verdict and entered judgment thereon.

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We have considered the other points urged for reversal but in the view we take of this case further discussion is unnecessary.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend and Scanlan, JJ., concur.

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unnecessary.

The judgment of the superior court of Cook county is

affirmed.

JUDGMENT AFFIRMED.

Friend and Scamian, JJ., concur.

42010

JOSEPH M. MCCARTHY,
Appellee,

v.

FRANK KATZIN and SAMUEL N.
KATZIN, individually and
as copartners doing business
as CLARK MAPLE MOTOR SALES,
Appellants.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

318 I.A. 639

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for \$3,772.50 entered in favor of plaintiff, Joseph M. McCarthy, and against defendants, Frank Katzin and Samuel N. Katzin, individually and as copartners doing business as Clark Maple Motor Sales.

The amended statement of claim alleges that plaintiff and defendants entered into a written lease under the terms of which the latter rented from the former certain premises for a period of five years commencing February 10, 1930 and ending February 9, 1935 at a monthly rental of \$200. The amended statement of claim contains an itemized statement showing an unpaid balance of rent claimed to be due from defendants for each of 43 successive months as follows: A balance of \$50 for the 18th month of the lease and for each of the next 17 months, and a balance of \$75 for each of the last 25 months of the lease. It is further alleged that defendants are liable for said balances amounting in the aggregate to \$2,775 and for interest on such balances amounting to \$997.50; and that they have often promised to pay the same but now refuse to do so.

The statement of defense admits the execution of the lease. It then avers that by an oral agreement entered into between plaintiff and defendants on June 25, 1931 the rents stipulated in the lease were reduced to \$150 a month and that by a subsequent oral agreement which the parties entered into on December 28, 1932 the rents were further reduced to \$125 a month; that in accordance

JOSEPH M. MCGARRITY
 Appellee
 v.
 FRANK KATZIN and SAMUEL M. KATZIN, individually and as copartners doing business as CLARK MAPLE MOTOR SALES, Appellants.

APPEAL FROM MUNICIPAL
 COURT OF CHICAGO

3131 A. 639

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

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with said oral agreements defendants paid plaintiff \$150 as rental for the 18th month of the lease period and a like amount for each of the next 17 months thereof and \$125 each month for the last 25 months of said lease period; and that the rents in such reduced amounts were delivered by defendants and accepted by plaintiff in full payment and satisfaction of the rents stipulated in the lease. Defendants deny in their statement of defense that "they promised in any form or manner to pay the amount herein sued upon, or any other amount, and say there is nothing due or owing from them or either of them to the plaintiff."

Plaintiff filed a replication denying that he entered into the oral agreements mentioned in the defendants' statement of defense.

It should be stated at the outset that plaintiff, Joseph M. McCarthy, is the owner of the property in question and that his son, Joseph M. McCarthy, Jr., represented his father as his authorized agent in all the negotiations and transactions involved herein. Hereinafter for convenience Joseph M. McCarthy, Jr., will be referred to as McCarthy. When his father is mentioned he will be referred to as McCarthy, Sr. About a year after the lease was executed by defendants, Frank Katzin and Samuel N. Katzin as copartners doing business as Clark Maple Motor Sales, their business was incorporated under the name Clark-Maple Chevrolet Co., Inc. However, we will refer to the Katzins throughout as defendants. The latter's principal place of business was in the building immediately north of plaintiff's property. The space covered by the lease in question was about fifty by sixty feet ~~and~~ in the rear part of the two most northerly stores in plaintiff's building. Such space adjoined the rear end of defendants' main building and fronted on the alley.

McCarthy testified that there was a balance of rent due from defendants under the lease of \$300 for 1931, \$600 for 1932, \$900 for 1933, \$900 for 1934 and \$75 for January, 1935 or an aggregate bal-

with said oral agreements defendants paid plaintiff \$100 as rental for the 18th month of the lease period and a like amount for each of the next 17 months thereof and \$125 each month for the last 25 months of said lease period; and that the rents in such reduced amounts were delivered by defendants and accepted by plaintiff in full payment and satisfaction of the rents stipulated in the lease. Defendants deny in their statement of defense that "they promised in any form or manner to pay the amount herein and upon, or any other amount, and say there is nothing due or owing from them or either of them to the plaintiff."

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ance of \$2,775.

He testified on cross-examination that he was directed by the court "to file a list of all documents" which he had in his possession that had "any materiality on the issues of this case." Pursuant to such direction he produced certain "rent ledger sheets" and "regular ledger sheets." After considerable hedging and evasion on his part as to whether the ledger sheets which he produced in court showed any balances due from defendants on the monthly rents or showed that the rental payments in the reduced amounts were merely received and accepted by him on account, he was asked the following question and made the following answer:

"Q. Where on that ledger does it show that it was paid on account? A. It does not show on here."

He also testified that he had "an accounts receivable ledger" but that "we could not locate that."

Defendant Frank Katzin testified that about June 25, 1931 he had a conversation with McCarthy in defendants' office in the presence of one Shallenberger; that McCarthy had come in to collect the June rent; that at that time he (the witness) told McCarthy that his business was in a desperate financial condition because of the depression and asked for a reduction in the rent stipulated in the lease; that after considerable discussion McCarthy agreed to a reduction of the monthly rental to \$150; that he advised his accountant Shallenberger in the presence of McCarthy that commencing with July, 1931 the rent would be \$150 a month and that defendants books were "set up on that basis;" that for 18 months thereafter he paid \$150 rent which McCarthy accepted; that about December 28, 1932 he and McCarthy had another conference concerning the increasingly desperate condition of defendants' business which resulted in an agreement for a further reduction in the rent to \$125 a month; that rent in this amount was paid monthly until the expiration of the lease; that thirteen of the checks delivered to McCarthy in payment of defendants' rent during

ance of \$2,775.

He testified on cross-examination that he was directed by the court "to file a list of all documents" which he had in his possession that had "any materiality on the issues of this case." Pursuant to such direction he produced certain "rent ledger sheets" and "regular ledger sheets." After considerable hedging and evasion on his part as to whether the ledger sheets which he produced in court showed any balances due from defendants on the monthly rents or showed that the rental payments in the reduced amounts were merely received and accepted by him on account, he was asked the following question and made the following answer:

"Q. Where on that ledger does it show that it was paid on account? A. It does not show on here."

He also testified that he had "an accounts receivable ledger" but that "we could not locate that."

Defendant Frank Katzin testified that about June 28, 1931 he had a conversation with McCarthy in defendant's office in the presence of one Shallenberger; that McCarthy had come in to collect the June rent; that at that time he (the witness) told McCarthy that his business was in a desperate financial condition because of the depression and asked for a reduction in the rent stipulated in the lease; that after considerable discussion McCarthy agreed to a reduction of the monthly rental to \$150; that he advised his accountant Shallenberger in the presence of McCarthy that commencing with July, 1931 the rent would be \$150 a month and that defendant's books were "set up on that basis"; that for 18 months thereafter he paid \$150 rent which McCarthy accepted; that about December 28, 1932 he and McCarthy had another conference concerning the increasingly desperate condition of defendant's business which resulted in an agreement for a further reduction in the rent to \$125 a month; that rent in this amount was paid monthly until the expiration of the lease; that thirteen of the checks delivered to McCarthy in payment of defendant's rent during

the last forty-three months of the term of the lease bore indorsements or notations in ink on the reverse side thereof indicating that they were given in payment of rent for the current month in which they were delivered and accepted; that the check for rent for the last month of the lease period bore the notation on the reverse side thereof "paid in full to end of lease;" that an attempt had been made to obliterate this notation but same was still visible; and that said indorsements or notations were made either by Shallenberger or by another employee of defendants, Miss Letl, before the checks were signed and delivered to McCarthy.

Thirty-four of the rental checks paid to and accepted by McCarthy were drawn by "Clark-Maple Chevrolet Co., Inc., by Frank Katzin, President." Each of said checks bears a rubber stamp indorsement, "Pay to order of Cosmopolitan State Bank, Chicago, Illinois. J. M. McCarthy & Co." These checks are shown in the following schedule:

"Date	Payee	Amount	Endorsement
9/15/31	J. M. McCarthy	\$150	
12/18/31	J. M. McCarthy	\$150	
4/19/32	J. McCarthy	\$150	April rent
6/18/32	J. M. McCarthy & Co.	\$150	
7/19/32	J. M. McCarthy	\$148	July Rent \$150.00 Less Accts. Rec. 2.00 \$148.00
8/22/32	J. McCarthy	\$150	
9/20/32	J. McCarthy Co.	\$150	
10/21/32	J. M. McCarthy	\$150	Rent for Oct. 1932
11/19/32	J. M. McCarthy	\$150	Rent for Nov. 1932
12/20/32	J. McCarthy	\$150	
1/16/33	W. M. McCarthy	\$125	
1/20/33	J. M. McCarthy	\$125	Rent Mo. of January, 1933
2/21/33	J. M. McCarthy	\$125	For February Rent
3/21/33	J. M. McCarthy	\$125	March Rent
4/18/33	J. M. McCarthy	\$125	
5/20/33	J. M. McCarthy	\$125	
6/16/33	J. M. McCarthy	\$125	
7/17/33	J. M. McCarthy	\$125	
8/15/33	J. M. McCarthy	\$125	
9/18/33	J. M. McCarthy	\$125	For September Rent
10/18/33	J. M. McCarthy	\$125	Rent for October
11/18/33	J. M. McCarthy	\$125	
12/14/33	J. M. McCarthy	\$125	Dec. rent
2/16/34	J. M. McCarthy	\$125	
3/16/34	J. M. McCarthy	\$125	
4/16/34	J. M. McCarthy	\$125	April Rent
5/17/34	J. M. McCarthy	\$125	May Rent
6/19/34	J. McCarthy	\$125	
7/17/34	J. M. McCarthy	\$125	

8/22/34	J. M. McCarthy	\$125	
9/21/34	J. M. McCarthy	\$125	Rent for Sept.
10/22/34	J. M. McCarthy	\$125	
12/30/34	J. McCarthy	\$125	
1/14/35	J. M. McCarthy	\$125	Paid in full to end of lease."

Frank Katzin further testified that upon the expiration of the lease involved herein McCarthy orally leased the same premises to defendants for \$75 a month for the period from February 19, 1935 until November 10, 1937; that on November 10, 1937 McCarthy entered into a written lease of the same premises with defendants at a rental of \$100 a month for the period from November 10, 1937 to November 9, 1939; that on December 4, 1939 another written lease for the same premises was given to defendants by McCarthy at a monthly rental of \$100 for the period from November 10, 1939 to November 9, 1941; that at no time since the rent was first reduced in July, 1931 did McCarthy make any demand for any balance of rent claimed to be due under the lease in question; that he made no such demand when he entered into the oral lease with defendants upon the expiration of the lease in controversy; and that he made no demand for any unpaid rent when the two subsequent written leases were entered into.

Chester Shallenberger testified that he was an accountant and that he worked for defendants from February, 1931 until December, 1937; that he made out all of the checks for rent during the time of his employment with the exception of a few that were made out by one of the office girls; that he made all the indorsements in ink on the reverse side of the checks with the exception of a few; that these indorsements were made by him before he presented the checks to Mr. Katzin for his signature; that he heard a conversation and discussion between defendant Frank Katzin and McCarthy in June, 1931 concerning a reduction in defendants' rent which culminated in McCarthy saying, "I will accept the sum of \$150 per month *** All right, Frank, I will take that \$150 for a while;" that never at any time when he paid McCarthy current rent did the latter say anything about "back rent;" and that when he delivered the check for \$125,

8/22/34	J. J. McCarthy	\$125
9/21/34	J. J. McCarthy	\$125
10/22/34	J. J. McCarthy	\$125
12/30/34	J. J. McCarthy	\$125
1/14/35	J. J. McCarthy	\$125

Paid in full to one of
lease."

Rent for Sept.

Frank Katzin further testified that upon the expiration of the lease involved herein McCarthy orally leased the same premises to defendants for 2 1/2 months for the period from February 10, 1935 until November 10, 1935; that on November 10, 1935 McCarthy entered into a written lease of the same premises with defendants at a rental of \$100 a month for the period from November 10, 1935 to November 9, 1935; that on December 4, 1935 another written lease for the same premises was given to defendants by McCarthy at a monthly rental of \$100 for the period from November 10, 1935 to November 9, 1936; that at no time since the rent was first reduced in July, 1935 did McCarthy make any demand for any balance of rent claimed to be due under the lease in question; that he made no such demand when he entered into the oral lease with defendants upon the expiration of the lease in controversy; and that he made no demand for any unpaid rent when the two subsequent written leases were entered into.

Chester Thalheimer testified that he was an accountant and that he worked for defendants from February, 1935 until December, 1935; that he made out all of the checks for rent during the time of his employment with the exception of a few that were made out by one of the office girls; that he made all the endorsements in ink on the reverse side of the checks with the exception of a few; that these endorsements were made by him before he presented the checks to Mr. Katzin for his signature; that he heard a conversation and discussion between defendant Frank Katzin and McCarthy in June, 1935 concerning a reduction in defendants' rent which culminated in McCarthy saying, "I will accept the sum of \$125 per month *** All right, Frank, I will take that \$125 for a while;" that never at any time when he paid McCarthy current rent did the latter say anything about "back rent;" and that when he delivered the check for \$125,

dated January 14, 1935, for rent for the last month's rent of the lease period, which bore the notation "paid in full to end of lease," McCarthy accepted same without objection.

Katherine Letl testified that she was employed by defendants as bookkeeper or assistant bookkeeper since 1931; that she made out some of the checks heretofore referred to for the payment of rent and made some of the indorsements or notations in ink on the reverse side thereof; that in December, 1932 she was sitting at her desk about three feet from where Frank Katzin and McCarthy were having a conversation; that she "heard Mr. Katzin tell Mr. McCarthy that business was so bad at that time, and he could not go on paying him \$150 rent, so he wanted it reduced to \$75, and Mr. McCarthy said he could not agree to that reduction but he would agree to reducing it to \$125."

McCarthy testified in rebuttal that he had a conversation with Katzin in July, 1931 in the latter's office and that at the time of this conversation some of defendant's employees were "within a few feet, 3 or 4 feet" of him; that he presumed that such employees could hear the conversation; that "it was regarding a reduction in rent *** he said that things were bad and that he could not pay \$200 a month as the lease provided for *** I said, 'Well, I will accept the rent on account, whatever you pay, I will accept it;' " that he "continued to accept checks for a lesser amount;" that Katzin did not tell him that "the checks would be in full;" that in July, 1932 Katzin "wanted another reduction in rent;" that "I told him it was impossible to give him another reduction. I asked him for the place at the time, and he would not give it up. I told him that we would take the building over, if he could not meet the rent;" that "I often talked to him about the balance he owed *** during 1933, 1934 and 1935 *** several times we talked about the balance due on the lease *** he said he was not in a position to pay anything *** he claimed that business was bad and he could not pay *** he was paying all he could pay

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Katherine left testified that she was employed by defendant as bookkeeper or assistant bookkeeper since 1931; that she made out some of the checks heretofore referred to for the payment of rent and made some of the endorsements or notations in ink on the reverse side thereof; that in December, 1932 she was sitting at her desk about three feet from where Frank Katzin and McCarthy were having a conversation; that she "heard" Mr. Katzin tell Mr. McCarthy that business was so bad at that time, and he could not go on paying him \$100 rent, so he wanted it reduced to \$75, and Mr. McCarthy said he could not agree to that reduction but he would agree to reducing it to \$125."

McCarthy testified in rebuttal that he had a conversation with Katzin in July, 1931 in the latter's office and that at the time of this conversation some of defendant's employees were "within a few feet, 3 or 4 feet" of him; that he presumed that such employees could hear the conversation; that "it was regarding a reduction in rent *** he said that things were bad and that he could not pay \$200 a month as the lease provided for *** I said, 'Well, I will accept the rent on account, whatever you pay, I will accept it;'" that he "continued to accept checks for a lesser amount;" that Katzin did not tell him that "the checks would be in full;" that in July, 1932 Katzin "wanted another reduction in rent;" that "I told him it was impossible to give him another reduction. I asked him for the place at the time, and he would not give it up. I told him that we would take the building over, if he could not meet the rent;" that "I often talked to him about the balance he owed *** during 1933, 1934 and 1935 *** several times we talked about the balance due on the lease *** he said he was not in a position to pay anything *** he claimed that business was bad and he could not pay *** he was paying all he could pay

at the present time."

After denying that the ink indorsements heretofore mentioned and set forth in the schedule were on the reverse side of the checks when he received and accepted same, McCarthy was asked the following question and made the following answer:

"Q. But you would not say absolutely that they were not there? A. No, I can't say absolutely."

It is stated in plaintiff's brief that "the question of agency was never raised by the plaintiff. To do so would place us in a ridiculous position." While it is true that the authority of McCarthy to act for his father in granting the rent reductions claimed by defendants was not denied in plaintiff's pleadings or by McCarthy's evidence, the question as to such authority was injected into the case by the testimony of McCarthy, Sr. His enfeebled condition precluded his attendance at the trial and his testimony was taken by deposition. When the deposition of McCarthy, Sr. was taken his counsel by a series of improper leading questions prompted him to testify in effect that, while his son was authorized as his agent to grant a temporary reduction in rent to defendants and to accept payments in the reduced amounts only on account of the rent as stipulated in the lease, it was outside of the scope of the son's authority to grant or to agree to a reduction in the rent and to accept rentals in the reduced amounts as payment in full of the monthly rents stipulated in the lease. When the deposition was presented in court counsel for defendants requested that the trial judge rule on their objections to the improper questions propounded to McCarthy, Sr. by his attorney upon the taking of his deposition and to also rule upon their several motions to strike the answers of McCarthy, Sr. to such improper questions. At that time plaintiff's counsel stated: "The questions that he is asked, your

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After denying that the ink impressions heretofore mentioned and set forth in the schedule were on the reverse side of the checks when he received and accepted same, McCarthy was asked the following question and made the following

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authority of McCarthy to act for his father in granting the rent reductions claimed by defendants was not denied in plaintiff's pleadings or by McCarthy's evidence, the question as to such authority was injected into the case by the testimony of McCarthy, Sr. His unsworn condition precluded his attendance at the trial and his testimony was taken by deposition. When the deposition of McCarthy, Sr. was taken his counsel by a series of improper leading questions prompted him to testify in effect

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in court counsel for defendants requested that the trial judge rule on their objections to the improper questions propounded to McCarthy, Sr. by his attorney upon the taking of his deposition and to also rule upon their several motions to strike the answers of McCarthy, Sr. to such improper questions. At that time plaintiff's counsel stated: "The questions that he is asked, your

Honor, were the questions that this Court wants to know, and was the purpose of the inquiry." The court then announced: "I will let the entire deposition go in for what its worth." There is no question but that the trial court was misled by McCarthy, Sr.'s, improper testimony in his deposition and by the foregoing statement of his attorney into erroneously finding that defendants failed to establish the fact "that McCarthy, Jr., acted within the scope of his authority" when he "reduced the rents." The trial court was also misled into stating: "It is very important, of course, whether or not the son was delegated, if the father was the owner of the property, whether or not the son was delegated to do certain things. That is really the gist of the case."

After thus misleading the trial judge into making an erroneous finding and making it necessary for defendants to devote a large portion of their brief to unanswerable arguments which demonstrate conclusively that McCarthy was his father's agent with full authority to act for him, McCarthy who is the controlling factor in this litigation insofar as the plaintiff is concerned filed a brief in this court through his counsel in which it is blithely stated that the authority of the son as the agent for his father was never in issue in this case. As has been seen it does appear that the question of McCarthy's agency and the scope of his authority was injected into this case in the trial court by the testimony of McCarthy, Sr., in his deposition and by the statement of plaintiff's attorney heretofore referred to and, even though that question has been abandoned here, McCarthy and plaintiff's counsel have placed themselves in rather "a ridiculous position" by having secured a favorable decision on an issue which they now say was never in the case and an adverse decision on the question as to whether McCarthy actually reduced the rents.

It is true of course that even though the reasons stated by the trial court for its decision are unsound, such decision

Honor, were the questions that this Court wants to know, and was the purpose of the inquiry." The court then announced: "I will let the entire disposition as to what is worth." There is no question but that the trial court was misled by McCarthy, Jr.'s improper testimony in his deposition and by the foregoing statement of his attorney into erroneously finding that defendant failed to establish the fact "that McCarthy, Jr., acted within the scope of his authority" when he "reduced the rents." The trial court was also misled into stating: "It is very important, of course, whether or not the son was delegated, if the father was the owner of the property, whether or not the son was delegated to do certain things. That is really the gist of the case."

After thus misleading the trial judge into making an erroneous finding and making it necessary for defendant to devote a large portion of their brief to unanswerable arguments which demonstrate conclusively that McCarthy was his father's agent with full authority to act for him, McCarthy who is the controlling factor in this litigation insofar as the plaintiff is concerned filed a brief in this court through his counsel in which it is briefly stated that the authority of the son as the agent for his father was never in issue in this case. As has been seen it does appear that the question of McCarthy's agency and the scope of his authority was injected into this case in the trial court by the testimony of McCarthy, Jr., in his deposition and by the statement of plaintiff's attorney heretofore referred to and, even though that question has been abandoned here, McCarthy and plaintiff's counsel have placed themselves in rather "a ridiculous position" by having secured a favorable decision on an issue which they now say was never in the case and an adverse decision on the question as to whether McCarthy actually reduced the rents.

It is true of course that even though the reasons stated by the trial court for its decision are unavailing, such decision

will not be reversed on appeal if the judgment is proper and correct; but that is true only where there is some legally sufficient ground to support such judgment.

Defendants' theory as stated in their brief as to the only remaining issue on this appeal is that "the evidence leaves no room to doubt the truth of the allegations in the Statement of Defense with respect to the oral agreements and the acceptance of the lesser amounts in full payment and satisfaction of the rents stipulated in the lease."

Plaintiff states his theory as follows: "Our theory has been consistent and was that we agreed to take less money on the terms of the lease, the payment of the balance to be postponed for a future time."

Therefore the only question left for our determination is whether McCarthy orally agreed to reduce the rents and then accepted the rent payments in the reduced amounts for forty-three months in full payment and satisfaction of the rents stipulated in the lease or whether, when he received said payments, he merely accepted same on account of the monthly rents stipulated in the lease.

The only proposition advanced by plaintiff in support of the position taken by him in this court is that "The finding of the trial court should not be disturbed." His counsel then cites four cases to the effect that the trial judge, having seen the witnesses and heard them testify, was in a better position than we are to determine their credibility and the weight to be accorded their testimony and that the finding of the trial court will not be disturbed unless it was against the manifest weight of the evidence. It is difficult to perceive wherein plaintiff can find any solace in this established rule in view of the fact, as heretofore shown, that the trial court in announcing the reasons for its finding stated that McCarthy "reduced the rents in place of what was required in the lease," but that it was outside of the

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what was required in the lease," but that it was outside of the

scope of his authority to do so. If the trial court had not been misled as to the authority of McCarthy to reduce the rents, and it is now conceded that he had such authority, it is fair to assume that if that concession had been made in the trial court the issues would have been found in favor of defendants.

In our opinion the evidence shows conclusively that McCarthy agreed to both reductions in the rent and that he accepted defendants' checks in the reduced amounts for forty-three months in full payment and satisfaction of the rents stipulated in the lease.

McCarthy's testimony was not corroborated by any other evidence in the record. As already shown he was directed to produce such documents or records used in his business as might have a bearing on whether or not there was a balance due and owing to plaintiff from defendants for rent. What did he produce? Not a single document or record that could possibly aid the court in determining whether there was any balance of rent due. The rent ledger sheets which he produced merely showed that there was posted thereon \$200 as the monthly rental stipulated in the lease and the amount of the reduced rental paid by defendants monthly. McCarthy then stated his conclusion that if the rent specified in the lease was \$200 a month as shown on the ledger sheet and defendants paid \$150 for a month's rent they must necessarily owe a balance of \$50 on the rent for the particular month. McCarthy testified that he kept an "accounts receivable ledger" which it is fair to assume would have definitely shown if defendants were charged by him with monthly balances of rent due. He did not produce this ledger. He said he couldn't find it. He made no attempt to testify as to its contents which he had a right to do if it was lost.

Katzin, Shallenberger and Miss Letl all testified that many of the checks contained indorsements or notations thereon in ink that they were in payment of the rent for the particular months in which said checks were delivered and that McCarthy accepted same

scope of his authority to do so. If the trial court had not been misled as to the authority of McCarthy to reduce the rents, and if it is now conceded that he had such authority, it is fair to assume that if that concession had been made in the trial court the issues would have been found in favor of defendants.

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Katzen, Shallenberger and Miss Lett all testified that many of the checks contained endorsements or notations thereon in ink that they were in payment of the rent for the particular month in which said checks were delivered and that McCarthy accepted same

without protest of any kind. Shallenberger corroborated Katzin's testimony as to McCarthy's first agreement to reduce the rent from \$200 to \$150 a month. Miss Letl testified that she heard McCarthy agree to the second reduction in rent from \$150 to \$125. Katzin's testimony is heretofore set forth rather fully and we deem it unnecessary to discuss same in detail.

Although McCarthy first accepted rent in July, 1931 in a lesser amount than that provided in the lease, this suit was not commenced until October 4, 1940. It will be remembered that the lease in question expired in February, 1935 and that thereafter three successive leases were entered into between the parties, under the first of which the rent was \$75 a month and under the other two it was \$100 a month. Defendants were occupying the premises under the last of these leases when this suit was instituted.

Katzin testified that the first time he knew that plaintiff claimed that defendants owed a balance for rent was when his bank notified him of the institution of this suit.

McCarthy states that he talked to Katzin "about the balances he owed" in 1933, 1934 and 1935. During 1933 and 1934 and in January, 1935 he was accepting \$125 as rent under a lease that called for \$200 a month. It is highly improbable that he would have talked to Katzin about a balance of rent owed for previous years and at the same time continue to accept from defendants less rent than the lease called for and thereby increase the purported balance. McCarthy, according to his own testimony, did not even mention to Katzin subsequent to 1935 that defendants owed a balance on their rent. It is difficult to understand why McCarthy remained silent as to such claimed balance between 1935 and the time he brought this action in 1940. He and defendants were close business neighbors and presumably saw each other frequently.

In Starkie on Evidence (1876 ed.) the author makes the following statement at p. 74:

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"In civil cases also, the most important presumptions *** are continually founded upon the conduct of the parties; if, for instance, a man suffer a great length of time to elapse without asserting the claim which he at last makes, a presumption arises, either that no real claim ever existed, or that, if it ever did exist, it has since been satisfied; because, in the ordinary course of human affairs, it is not usual to allow real and well-founded claims to lie dormant."

When the reductions in rent are said to have been accomplished the country was in the depth of the depression and it is a matter of common knowledge that landlords generally made concessions to their tenants and adjustments and readjustments in rents not only so that the tenants might survive in business but also so that the landlords might keep their buildings occupied even at reduced rents. The fact that the claimed reduction agreements were made and the payments of rent in the reduced amounts were accepted during the depression period is highly significant in this case and renders even more probable defendants' version of the transactions involved herein.

As already stated McCarthy received checks from defendants for 43 successive months in payment of rent, 18 of them for \$150 each and 25 of them for \$125 each. All these checks were for an amount less than the monthly rent specified in the lease.

We are convinced that when 13 of these checks were delivered to McCarthy they bore the indorsements or notations denoting that they were given in payment of the rent for the months shown by the foregoing schedule and that McCarthy, with full knowledge of such indorsements and that said checks were intended as payment in full of the rent for the months indicated, accepted same as full payment of the rents stipulated in the lease. This is also true of the check for the last month of the lease period which bore the notation, "Paid in full to end of lease." It follows that if these 14 checks in reduced amounts were accepted in full payment the other 29 checks in reduced amounts were also accepted in full payment and satisfaction of the rents stipulated in the lease.

"In civil cases also, the most important presumptions *** are continually founded upon the conduct of the parties; it, for instance, a man suffers a great length of time to elapse without asserting the claim which he at last makes a presumption arises, that that no real claim ever existed; or that, if it ever did exist, it has since been satisfied; because, in the ordinary course of human affairs, it is not usual to allow real and well-founded claims to lie dormant."

When the reductions in rent are said to have been accomplished the country was in the depth of the depression and it is a matter of common knowledge that landlords generally made concessions to their tenants and adjustments and reductions in rents not only so that the tenants might survive in business but also so that the landlords might keep their buildings occupied even at reduced rents. The fact that the claimed reduction agreements were made and the payments of rent in the reduced amounts were accepted during the depression period is highly significant in this case and renders even more probable defendants' version of the transactions involved herein.

As already stated McCarthy received checks from defendants for 43 successive months in payment of rent, 18 of them for \$150 each and 25 of them for \$125 each. All these checks were for an amount less than the monthly rent specified in the lease. We are convinced that when 13 of these checks were delivered to McCarthy they bore the endorsements or notations denoting that they were given in payment of the rent for the months shown by the foregoing schedule and that McCarthy, with full knowledge of such endorsements and that said checks were intended as payment in full of the rent for the months indicated, accepted same as full payment of the rents stipulated in the lease. This is also true of the check for the last month of the lease period which bore the notation, "Paid in full to end of lease." It follows that if these 14 checks in reduced amounts were accepted in full payment the other 29 checks in reduced amounts were also accepted in full payment and satisfaction of the rents stipulated in the lease.

In Doyle v. Dunne, 144 Ill. App. 14, the facts are very similar to the facts here. In that case the landlord's agent made an oral agreement to reduce the rents stipulated in a lease under seal. The agreement was carried out by the acceptance of the reduced rents in place of the rents reserved in the lease. Various rent receipts that are set forth in the opinion in that case are no different in effect from the checks bearing the afore-said indorsements or notations in the instant case. There the court said, at pp. 19 and 20:

"We think that these receipts taken together clearly show that \$65 a month was paid by Dunne and received by Mary Doyle's agents *** for July, 1897, and for each month thereafter separately during the continuance of the lease up to and including April, 1903. We attribute no importance to the expression 'on acct.,' 'for acct. of,' etc., in the receipts. The expression very commonly means 'on the score of,' or merely 'for,' and sometimes means nothing. The evident fact, shown by this long series of payments of \$65 monthly following the conversation which the record shows concerning a reduction of rent, and uninterrupted or followed by any complaint or demand for more money until, almost a year after the lease had expired, this suit was brought, is that these payments were respectively made and accepted as the full rent for the months respectively preceding them."

The law as enunciated in the foregoing case, which is peculiarly applicable to the factual situation presented here, was adhered to in Levy v. Greenberg, 261 Ill. App. 541, where the court said, at pp. 544, 545, 546:

"This court had occasion to consider the same question in the case of Doyle v. Dunne, 144 Ill. App. 14. In that case it was held that a parol agreement to reduce rent, entered into by a lessor without consideration, is a mere nudum pactum, not binding, and while the lease remains executory, is not susceptible of being enforced, but that a reduction accomplished periodically as the rent accrues by accepting a sum less than the stipulated rent for such period is valid and constitutes an executed gift.

"The theory of the foregoing cases is that the difference in the amount contracted for and the amount actually paid by the tenant, as rental, is considered waived and released, and cannot thereafter be claimed and recovered by the lessor. ***

"As indicated by the court in Doyle v. Dunne, supra, the test is not whether there was a consideration for the reduction of the rent, but whether the gift was executed or unexecuted. Applying this test to the facts stipulated herein, it clearly appears that the agreement for the reduced rental was executed by the parties during a large portion of the term and required no consideration. Under the authorities, hereinbefore cited, we are disposed to regard the reductions in rental as gifts of

In Boyle v. Dunne, 144 Ill. pp. 14, the facts are very similar to the facts here. In that case the landlord's agent made an oral agreement to reduce the rents stipulated in a lease under seal. The agreement was carried out by the acceptance of the reduced rents in place of the rents reserved in the lease. Various rent receipts that are set forth in the opinion in that case are no different in effect from the checks bearing the above-mentioned indorsements or notations in the instant case. There the court said, at pp. 19 and 20:

"We think that these receipts taken together clearly show that \$65 a month was paid by Dunne and received by Boyle's agents *** for July, 1897, and for each month thereafter separately during the continuance of the lease up to and including April, 1903. The expression 'for each month thereafter' is an expression very commonly means 'on the score of' or merely 'for,' and sometimes means nothing. The evident fact, shown by this long series of payments of \$65 monthly following the conversation which the record shows concerning a reduction of rent, and uninterrupted or followed by any complaint or demand for more money until, almost a year after the lease had expired, this suit was brought, is that these payments were respectively made and accepted as the full rent for the months respectively preceding them."

The law as enunciated in the foregoing case, which is peculiarly applicable to the factual situation presented here, was adhered to in Levy v. Greengard, 261 Ill. pp. 241, where the court said, at pp. 244, 245, 246:

"This court had occasion to consider the same question in the case of Boyle v. Dunne, 144 Ill. pp. 14. In that case it was held that a parol agreement to reduce rent, entered into by a lessor without consideration, is a mere nudum pactum, not binding, and while the lease remains executory, is not susceptible of being enforced, but that a reduction accomplished partially as the rent accrues by accepting a sum less than the stipulated rent for each period is valid and constitutes an executed gift."

"The theory of the foregoing cases is that the difference in the amount contracted for and the amount actually paid by the tenant, as rental, is considered waived and released, and cannot thereafter be claimed and recovered by the lessor. ***"

"As indicated by the court in Boyle v. Dunne, supra, the test is not whether there was a consideration for the reduction of the rent, but whether the gift was executed or unexecuted. Applying this test to the facts stipulated herein, it clearly appears that the agreement for the reduced rental was executed by the parties during a large portion of the term and ratified no consideration. Under the authorities, hereinbefore cited we are disposed to regard the reductions in rental as gifts of

separate and distinct items each month, and when the same were paid and accepted, we believe the gift in each case was complete and irrevocable ***."

Under all the facts and circumstances in evidence we are impelled to hold that the checks in reduced amounts, delivered to McCarthy in payment of rent for the last 43 months of the lease period, were recognized and accepted by him as payment in full of the rents for said months.

Since, as heretofore shown, the finding of the trial court, upon which the judgment herein was based, was predicated upon an erroneous theory, and since there is no other legally sufficient ground shown ~~herein~~ upon which the judgment may be sustained, it will necessarily have to be reversed.

For the reasons stated the judgment of the Municipal court of Chicago is reversed, and inasmuch as the trial was had by the court without a jury and it would serve no useful purpose to remand the cause, judgment is entered here in favor of defendants and against plaintiff.

JUDGMENT REVERSED AND JUDGMENT HERE
IN FAVOR OF DEFENDANTS AND AGAINST
PLAINTIFF.

Friend and Scanlan, JJ., concur.

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Under all the facts and circumstances in evidence we are impelled to hold that the checks in reduced amounts, delivered to Security in payment of rent for the last 43 months of the lease period, were recognized and accepted by him as payment in full of the rents for said months.

Since, as heretofore shown, the finding of the trial court, upon which the judgment herein was based, was predicated upon an erroneous theory, and since there is no other legally sufficient ground shown upon which the judgment may be sustained, it will necessarily have to be reversed.

For the reasons stated the judgment of the Municipal Court of Chicago is reversed, and inasmuch as the trial was had by the court without a jury and it would serve no useful purpose to remand the cause, judgment is entered here in favor of

defendants and against plaintiffs.

JUDGMENT REVERSED AND JUDGMENT HERE
IN FAVOR OF DEFENDANTS AND AGAINST
PLAINTIFF.

Friend and Scanlan, J., concur.

42368

MEYER KROM, LENA KROM, ABRAHAM KROM,
SAMUEL KROM and ARCHIE KROM, as
trustees under trust agreement
known as "KROM TRUST," recorded as
Document No. 11735193,

Appellants,

v.

PUBLIC UTILITIES SERVICE, a
corporation,

Appellee.

318 I.A. 639²

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

319

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action at law brought by plaintiffs Meyer Krom, Lena Krom, Abraham Krom, Samuel Krom and Archie Krom, as trustees under trust agreement known as "Krom Trust," recorded as document No. 11735193, against defendant, Public Utilities Service, a corporation, to recover damages for the alleged breach of a contract. On defendant's motion the trial court ordered the complaint stricken and granted leave to plaintiffs to file an amended complaint. Plaintiffs electing to stand on their complaint, the suit was dismissed and plaintiffs appeal.

The complaint alleged substantially that March 31, 1941 defendant and plaintiffs Meyer Krom, Lena Krom, Abraham Krom, Samuel Krom and Archie Krom, as trustees under trust agreement known as "Krom Trust," recorded as Document No. 11735193, entered into a written contract, a copy of which was attached to and made a part of the complaint; that under the terms of such contract plaintiffs agreed, among other things, "to grant to defendant the sole and exclusive right of supplying electric current to all occupants of premises at 2200-2208 East 71st street, Chicago, Illinois, then owned by plaintiffs, for 120 months from date electric current was first supplied to occupants;" that "in consideration whereof defendant agreed to pay to plaintiffs \$420 per year in monthly installments of \$35 per month commencing from date current was first supplied by defendant to occupants of said building, the first payment to be made 30 days after first resale

3181A.689

APPEAL FROM SUPREME COURT, COOK COUNTY.

MEYER KROM, LEON KROM, ABRAHAM KROM, SAMUEL KROM and ARCHIE KROM, as trustees under trust agreement known as "KROM TRUST," recorded as Document No. 11735193, Appellants,

v.
PUBLIC UTILITIES SERVICE, a corporation, Appellee.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action at law brought by plaintiffs Meyer Krom, Leon Krom, Abraham Krom, Samuel Krom and Archie Krom, as trustees under trust agreement known as "Krom Trust," recorded as Document No. 11735193, against defendant, Public Utilities Service, a corporation, to recover damages for the alleged breach of a contract. On defendant's motion the trial court ordered the complaint stricken and granted leave to plaintiffs to file an amended complaint. Plaintiffs electing to stand on their complaint, the suit was dismissed and plaintiffs appeal.

The complaint alleged substantially that March 31, 1941 defendant and plaintiffs Meyer Krom, Leon Krom, Abraham Krom, Samuel Krom and Archie Krom, as trustees under trust agreement known as "Krom Trust," recorded as Document No. 11735193, entered into a written contract, a copy of which was attached to and made a part of the complaint; that under the terms of such contract plaintiffs agreed, among other things, "to grant to defendant the sole and exclusive right of supplying electric current to all occupants of premises at 2208-2208 East 71st Street, Chicago, Illinois, then owned by plaintiffs, for 120 months from date electric current was first supplied to occupants;" that "in consideration whereof defendant agreed to pay to plaintiffs \$420 per year in monthly installments of \$35 per month commencing from date current was first supplied by defendant to occupants of said building, the first payment to be made 30 days after first resale

billings were rendered and to be made in any event not later than 90 days from date of said agreement;" that "plaintiffs on their part duly performed all terms and conditions of said agreement" and "are ready and willing to continue to perform said agreement;" and that defendant in violation of the terms of the contract has wrongfully failed and refused to make the payments or any of them due plaintiffs under said contract.

The following provisions of the contract are sufficient to indicate its nature and purpose:

"Agreement made March 31, 1941 between Public Utilities Service, a corporation, party of first part, hereinafter referred to as Company, and "Krom Trust," party of second part, hereinafter referred to as Owner.

"Witnesseth: That Whereas Company is engaged in business of electrical engineering and a part of said business is handling for owners of buildings resale of electric current to tenants and users in their buildings; and,

"Whereas Owner is in lawful possession of certain real property located at 2200-2208 East 71st St., in Chicago, Cook County, Ill., and at the present time electric current is furnished to tenants and users in said property individually by Commonwealth Edison Co.; and,

"Whereas it is the desire of Owner that all tenants and users obtain current through one or more master meters of Commonwealth Edison Co., the Company to resell current directly to tenants and users in said property.

"Now, Therefore, be it agreed by and between parties hereto that Company is granted by Owner the sole and exclusive right of supplying electric current to all occupants of above described premises during term of this agreement and Company agrees to do so on the following terms, except as to tenants refusing to purchase electric current from Company:

"1. Owner in his own name on behalf of Company agrees to contract with Commonwealth Edison Co. for the supply of electric current for said premises by master meters during period of agreement. The cost and expenses therefor and deposits made by Owner as required by Commonwealth Edison Co. to be immediately repaid by Company to Owner.

"3. Company is to supply current to occupants. The rate and terms therefor shall be the same as Commonwealth Edison Co. now charges or in future will charge to or make with its own customers.

"4. Company shall be responsible in damages to Owner for any loss or damage they may sustain for any failure of Company to supply electricity to tenants of Owner or for interruption or reversal of supply if by reason of such failure, interruption or reversal Owner suffers any loss *** or damage.

billings were rendered and to be made in any event not later than 90 days from date of said agreement; that "plaintiffs on their part duly performed all terms and conditions of said agreement" and "are ready and willing to continue to perform said agreement" and that defendant in violation of the terms of the contract has wrongfully failed and refused to make the payments or any of them due plaintiffs under said contract.

The following provisions of the contract are sufficient

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"Agreement made March 31, 1941 between Public Utilities Service, a corporation, party of first part, hereinafter referred to as Company, and "Krom Trust," party of second part, hereinafter referred to as Owner.

"Witnesseth: That Whereas Company is engaged in business of electrical engineering and a part of said business is handling for owners of buildings resale of electric current to tenants and users in their buildings; and,

"Whereas Owner is in lawful possession of certain real property located at 2306-2308 East 71st St., in Chicago, Cook County, Ill., and at the present time electric current is furnished to tenants and users in said property individually by Commonwealth Edison Co.; and,

"Whereas it is the desire of Owner that all tenants and users obtain current through one or more master meters of Commonwealth Edison Co., the Company to retail current directly to tenants and users in said property.

"Now, Therefore, be it agreed by and between parties hereto that Company is granted by Owner the sole and exclusive right of supplying electric current to all occupants of above described premises during term of this agreement and Company agrees to do so on the following terms, except as to tenants refusing to purchase electric current from Company:

"1. Owner in his own name on behalf of Company agrees to contract with Commonwealth Edison Co. for the supply of electric current for said premises by master meters during period of agreement. The cost and expenses therefor and deposits made by Owner as required by Commonwealth Edison Co. to be immediately repaid by Company to Owner.

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"4. Company shall be responsible in damages to Owner for any loss or damage they may sustain for any failure of Company to supply electricity to tenants of Owner or for interruption or reversal of supply if by reason of such failure, interruption or reversal Owner suffers any loss or damage.

"5. Company agrees that Owner or occupants will not be liable for any expense that may arise at any time either in preparation or performance of resale of current and Company will pay all bills and assume all responsibility in its preparation or performance of resale of current. Company agrees to furnish Owner with waivers of lien before commencing any work in or about premises of Owner on installing its system under this agreement.

"6. For privilege of reselling current to occupants, Company agrees to pay to Owner \$420 per year in monthly installments of \$35 per month commencing from date current is first supplied by Company to occupants, first payment to be made 30 days after first resale billings are rendered. The first payment to be made in any event under this agreement not later than 90 days from this date.

"9. Contract shall remain in force for 120 months from date current is first supplied to occupants as hereinbefore provided, and shall bind at all times heirs, executors, administrators, successors and assigns of respective parties herein as well as all subsequent owners of premises during term of contract."

The contract was signed in the following manner:

"In Witness Whereof parties hereto have hereunto set their hands and seals, day and year first above written.

Public Utilities Service
By (Signed) W. H. Hazelhurst
President

Attest:

(Signed) Hector A. Brouillet
Secretary.

'Krom Trust'

By S. H. Krom, Trustee (Seal)
Archie Krom, Trustee
Meyer Krom, Trustee (Seal)
Trustees under trust agreement
recorded as Doc. No. 11735193"

Plaintiffs' theory as stated in their brief is that the "contract sued on is between defendant and plaintiffs as trustees and binds both parties; that the name 'Krom Trust' as used in contract is merely a trade name under which trustees contracted; that defendant having executed contract is estopped to deny plaintiffs' capacity or that contract does not bind it; that Lena Krom and Abraham Krom, the trustees not signing contract are necessary plaintiffs with the other trustees in a suit on contract for benefit of trust; that under contract, obligation to make payment is absolute and not dependent on whether current was resold by defendant and defendant may not assert that complaint must show that three trustees signing contract were authorized to do so."

"7. Company agrees that Owner on occupants will not be liable for any expense that may arise at any time either in preparation or performance of resale of current and Company will pay all bills and assume all responsibility in its preparation or performance of resale of current. Company agrees to furnish Owner with waivers of lien before commencing any work in or about premises of Owner on installing its system under this agreement.

"8. For privilege of reselling current to occupants, Company agrees to pay to Owner \$450 per year in monthly installments of \$37 1/2 per month commencing from date current is first supplied by Company to occupants, first payment to be made 30 days after first resale billings are rendered. The first payment to be made in any event under this agreement not later than 90 days from this date.

"9. Contract shall remain in force for 120 months from date current is first supplied to occupants as hereinafore provided, and shall bind at all times heirs, executors, administrators, successors and assigns of respective parties herein as well as all subsequent owners of premises during term of contract."

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the trustees signing contract were authorized to do so."

Defendant relies upon the following propositions to sustain the judgment order of the trial court dismissing plaintiffs' complaint:

"1. This is an action at law and the complaint was defective in form in that plaintiffs purported to bring the action in their special capacities as trustees, rather than as individuals.

"2. The complaint shows on its face that 'Krom Trust' was not a trade name under which plaintiffs as individuals bound themselves, but on the contrary was a trust estate or trust agreement, and not competent to contract.

"3. The two trustees who did not sign the contract are not proper parties to the action because they were not parties to the contract. A contract made by a trustee on behalf of the trust estate is his personal contract, and the fact that another person is a cotrustee does not cause such cotrustee to be bound by the contract.

"4. Presumptively, all cotrustees must join in a contract to bind trust property, and this complaint showed on its face that the supposed contract was made by only three of the five trustees. Therefore the complaint did not show a valid contract.

"5. If we assume that the contract was binding, still the complaint showed no right to recover because payments were not due under its terms until after electric current had been resold, and the complaint does not allege that this had occurred."

There were five trustees of the so called "Krom Trust." One of the parties named in the contract was "Krom Trust" as "Owner" of the premises. As heretofore shown, in so far as the "Owner" was concerned, the contract was signed as follows: "'Krom Trust,' by S. H. Krom, Trustee, Archie Krom, Trustee, Meyer Krom, Trustee, Trustees under trust agreement recorded as Doc. No. 11735193." There can be no question but that if the five trustees signed the contract using the term "Krom Trust" merely as a trade name such contract would have been valid and binding. That being so, if the

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There can be no question but that if the five trustees signed the contract using the term "Krom Trust" merely as a trade name such contract would have been valid and binding. That being so, if the

three trustees who did sign the contract used the term "Krom Trust" merely as a trade name and acted not only in their own behalf but as agents for the two trustees who did not sign the contract, same would have been a valid and binding obligation. Whether "Krom Trust" one of the parties named in the contract and specified therein as the owner of the property was merely used as a trade name by the trustees in the execution of said contract presents a question of fact. Whether the three trustees who signed the contract acted not only in their own behalf but also as agents of the two who did not sign likewise presents a question of fact.

We think that the complaint sufficiently states a cause of action. Upon a trial of this case on the merits it will of course be incumbent upon plaintiffs to show that they are competent parties if that question is raised by defendant's answer.

One of the grounds urged in defendant's motion to strike plaintiffs' complaint and also argued here would necessitate our construction of the contract to determine whether, as plaintiffs claim, the first monthly installment payment of \$35 was to be made to them in any event not later than 90 days from the date of the contract or whether, as defendant claims, no payments were due from it to plaintiffs under the terms of the contract until after electric current had been resold to the occupants of plaintiffs' building. We do not think that this matter was considered by the trial court when it sustained the motion to strike plaintiffs' complaint. In any event we are of opinion that it would be premature for us to construe the contract at this time.

In the present state of the record it does not appear whether or not defendant received any benefits under the contract, but when it executed same, it certainly anticipated that it would. To accomplish its purpose it was essential that defendant contract with the owner or owners of the legal title to the property in question. "A number of trustees are in law but one person and

three trustees who did sign the contract used the term "Krom Trust" merely as a trade name and acted not only in their own behalf but as agents for the two trustees who did not sign the contract, same would have been a valid and binding obligation. Whether "Krom Trust" one of the parties named in the contract and specified therein as the owner of the property was merely used as a trade name by the trustees in the execution of said contract presents a question of fact. Whether the three trustees who signed the contract acted not only in their own behalf but also as agents of the two who did not sign likewise presents a question of fact. We think that the complaint sufficiently states a cause of action. Upon a trial of this case on the merits it will of course be incumbent upon plaintiffs to show that they are competent parties if that question is raised by defendant's answer.

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In the present state of the record it does not appear whether or not defendant received any benefits under the contract, but when it executed same, it certainly anticipated that it would. To accomplish its purpose it was essential that defendant contract with the owner or owners of the legal title to the property in question. "A number of trustees are in law but one person and

as a rule must join in legal proceedings." (65 C. J. 861.) As has been shown, it is alleged in plaintiffs' complaint that all five trustees under the trust agreement known as "Krom Trust," including the two who did not actually sign the contract, were the owners of the premises in question, entered into the contract and performed same. These allegations present issues of fact which it is also incumbent upon plaintiffs to prove when the cause is heard on the merits.

We have considered all the points urged and the authorities cited in connection therewith but in the view we take of this case we deem further discussion unnecessary.

For the reasons stated herein the judgment order of the Superior court of Cook county dismissing this action is reversed and the cause is remanded with directions to deny defendant's motion to strike plaintiffs' complaint, to require defendant to file an answer to said complaint and that such further proceedings be had as are not inconsistent with the views herein expressed.

JUDGMENT ORDER REVERSED AND
CAUSE REMANDED WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

as a rule must join in legal proceedings." (67 O. 2, 861.) As has been shown, it is alleged in plaintiff's complaint that all five trustees under the trust agreement known as "Iron Trust," including the two who did not actually sign the contract, were the owners of the premises in question, entered into the contract and performed same. These allegations present issues of fact which it is also incumbent upon plaintiff to prove when the cause is heard on the merits.

We have considered all the points urged and the authorities cited in connection therewith but in the view we take of this case we deem further discussion unnecessary.

For the reasons stated herein the judgment order of the Superior court of Cook county dismissing this action is reversed and the case is remanded with directions to deny defendant's motion to strike plaintiff's complaint, to require defendant to file an answer to said complaint and that such further proceedings be had as are not inconsistent with the views herein expressed.

JUDGMENT ORDER REVERSED AND
CAUSE REMANDED WITH DIRECTIONS.

Friend and Counsel, J. J. Connel.

42251

SAM MIRZA,
Appellee,

v.

ELIZABETH MIRZA,
Appellant.

APPEAL FROM SUPERIOR COURT.

COOK COUNTY.

318 I.A. 640

3 21

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Sam Mirza filed a complaint against his wife Elizabeth seeking divorce and the conveyance to him of an undivided one-half interest in certain improved real estate to which Mrs. Mirza had title. The chancellor granted plaintiff a divorce, to which no objection is raised, but defendant appeals from that portion of the decree which directed her to pay him ten dollars a week "for support money and alimony and in lieu of" his "dower interest in and to the real estate," and \$200 as and for his attorney's fees and costs.

The parties were married in New York in 1910. Subsequently they moved to Chicago, where they resided as husband and wife until their separation in 1938. No children were born of the marriage. During the time that they lived together they purchased an old building at 1816 Lincoln Park West in Chicago, which was remodeled into eight apartments leased to tenants on a temporary lease basis. Defendant is forty-seven years of age, is not employed and has no income other than that derived from the property. Plaintiff, who is fifty years old, operates an ice business, from which his net income is fifteen dollars a week. Defendant averred in her answer, and testified without denial on plaintiff's part, that shortly after their marriage she contributed to the family income by taking in roomers, in addition to performing her usual duties as housewife, and thereby accumulated a considerable portion of the funds with which the property was purchased. Title to the building was taken in joint tenancy, but some time prior to the divorce proceeding one of plaintiff's trucks struck a woman who died as a result of the injuries sustained, and immediately thereafter, plaintiff, after

SAM MIRZA, Appellee,
v.
ELIZABETH MIRZA, Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

3181A.610

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

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The parties were married in New York in 1910. Subsequently they moved to Chicago, where they resided as husband and wife until their separation in 1938. No children were born of the marriage. During the time that they lived together they purchased an old building at 1816 Lincoln Park West in Chicago, which was remodeled into eight apartments leased to tenants on a temporary lease basis. Defendant is forty-seven years of age, is not employed and has no income other than that derived from the property. Plaintiff, who is fifty years old, operates an ice business, from which his net income is fifteen dollars a week. Defendant averred in her answer, and testified without denial on plaintiff's part, that shortly after their marriage she contributed to the family income by taking in roomers, in addition to performing her usual duties as housewife, and thereby accumulated a considerable portion of the funds with which the property was purchased. Title to the building was taken in joint tenancy, but some time prior to the divorce proceeding one of plaintiff's trucks struck a woman who died as a result of the injuries sustained, and immediately thereafter, plaintiff, after

consultation with an attorney, together with his wife conveyed the property to a third person who, in turn, deeded it to plaintiff's wife, in order to avoid any possible judgment that might be rendered against him by reason of the accident referred to. These circumstances were not denied by plaintiff either in the pleadings or upon trial.

The court predicated his order for payment of ten dollars a week upon the finding in the decree of a \$2,000 annual net income from the property. The evidence does not sustain that finding. One of defendant's witnesses testified without denial that the gross income from the property varied from \$2,200 to \$2,500 a year and that the maintenance expense, which she itemized, including taxes, coal, janitor's services, electric light, water, fire and accident insurance, decorating and commissions for the collection of rentals, aggregated about \$1,400 annually, leaving a net income of between \$800 and \$1,100 a year. She was unable to produce any exact figures as to money expended for annual repairs on the building, but testified that such expenses were necessarily incurred from time to time. Upon this state of the record the decree awarded plaintiff \$520 out of the aforementioned net income, which, in addition to the fifteen dollars a week that he earned in his business, would have given him an income of twenty-five dollars a week, as against approximately eight dollars a week for defendant. The record does not warrant any such order, nor can the allowance of \$200 attorney's fees be justified in view of the circumstances of the parties.

Moreover, defendant's answer averred, and her undisputed testimony shows, that the conveyance of the property to her was made in defraud of a possible creditor, and such conveyance, although binding on the parties to it, cannot be set aside at the suit of the grantor. In Rosenbaum v. Huebner, 277 Ill. 360, it was held that a court of equity will not aid a grantor who has conveyed his property to his children to defraud creditors, by declaring a resulting or constructive trust, such as is claimed

consultation with an attorney, together with his wife conveyed the property to a third person who, in turn, deeded it to plaintiff's wife, in order to avoid any possible judgment that might be rendered against him by reason of the accident referred to. These circumstances were not denied by plaintiff either in the pleadings or upon trial.

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in the case at bar, but will leave the parties where it finds them and allow the children to partition the land among themselves.

Plaintiff has filed no brief on appeal. The income from his business is substantially the same as the net proceeds of the real estate to which his wife holds title. The award of alimony, in lieu of dower, and solicitor's fees cannot be justified upon the record, and therefore that portion of the decree pertaining thereto should be reversed, and it is so ordered.

THAT PORTION OF THE DECREE PERTAINING
TO ALIMONY AND SOLICITOR'S FEES
REVERSED.

Sullivan, P. J., and Scanlan, J., concur.

in the case at bar, but will leave the parties where it finds them and allow the children to partition the land among themselves. Plaintiff has filed no brief on appeal. The income from his business is substantially the same as the net proceeds of the real estate to which his wife holds title. The award of alimony, in lieu of dower, and solicitor's fees cannot be justified upon the record, and therefore that portion of the decree pertaining thereto should be reversed, and it is so ordered.

REVERSED,
TO ALIMONY AND SOLICITOR'S FEES
THAT PORTION OF THE DECREE PERTAINING

Sullivan, P. J., and Scanlan, J., concur.

42392

GOLDIE BUEHLER,
Appellee,

v.

ALBERT C. BUEHLER,
Appellant.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

318 I.A. 640

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On October 20, 1937, plaintiff had a decree for divorce from defendant on the ground of cruelty, wherein she was awarded as permanent alimony for herself \$175 a month, custody of two minor children and solicitors' fees. On appeal we increased her alimony to \$300 a month. (Buehler v. Buehler, 305 Ill. App. 609.) From that judgment defendant petitioned for and was allowed an appeal to the Supreme court, which reversed our judgment and affirmed the decree as entered. (Buehler v. Buehler, 373 Ill. 626.) Since those two appeals defendant has prosecuted five others arising out of the decree, not including his petition for leave to appeal to the Supreme court in cause No. 41682, which was denied, and it was admitted by counsel on oral argument that another appeal will shortly follow.

For an understanding of the issues involved in this proceeding a review of the course of litigation is essential. While the first petition for leave to appeal was pending in the Supreme court, plaintiff filed a petition in the Superior court alleging that she desired to file an answer thereto, that further proceedings might be required in the Supreme court, that it had become necessary to employ counsel to prepare such answer, to pay appearance fee, printers' bills, costs of additional transcript and possible other outlays, and she asked that defendant be ruled to pay reasonable suit money and attorneys' fees in connection with that proceeding. Over defendant's objection the chancellor required him to pay plaintiff, for and on account of attorneys' fees and costs to defend the petition then pending in the Supreme

GOLDIE BUNNELL
Appellee,

v.

ALBERT C. BUNNELL
Appellant.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY, ILL.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On October 20, 1937, plaintiff had a decree for divorce from defendant on the ground of cruelty, wherein she was awarded as permanent alimony for herself \$175 a month, custody of two minor children and solicitors' fees. On appeal we increased her alimony to \$300 a month. (Bunnell v. Bunnell, 307 Ill. App. 609.) From that judgment defendant petitioned for and was allowed an appeal to the Supreme court, which reversed our judgment and affirmed the decree as entered. (Bunnell v. Bunnell, 373 Ill. 626.) Since those two appeals defendant has prosecuted five others arising out of the decree, not including his petition for leave to appeal to the Supreme court in cause No. 41682, which was denied, and it was admitted by counsel on oral argument that another appeal will shortly follow.

For an understanding of the issues involved in this proceeding a review of the course of litigation is essential. While the first petition for leave to appeal was pending in the Supreme court, plaintiff filed a petition in the Superior court alleging that she desired to file an answer thereto, that further proceedings might be required in the Supreme court, that it had become necessary to employ counsel to prepare such answer, to pay appearance fee, printers' bills, costs of additional transcript and possible other outlays, and she asked that defendant be ruled to pay reasonable suit money and attorneys' fees in connection with that proceeding. Over defendant's objection the chancellor required him to pay plaintiff, for and on account of attorneys' fees and costs to defend the petition then pending in the Supreme

court, the sum of \$250, which he paid by check, accompanied by a letter saying that the payment was "to be applied upon such indebtedness as may ultimately be determined to be due from Mr. A. C. Buehler to Mrs. Goldie Buehler under and pursuant to divorce decree which may ultimately and finally be entered in this proceeding, including attorney's fees." Thereafter plaintiff filed another petition in the Superior court reciting the decree, the modification thereof by the Appellate court, the order of the Supreme court allowing the appeal, and alleging that in the ordinary course of the hearing she would be required to file in the Supreme court printed briefs and to appear by her counsel on oral argument of the cause; that in order properly to defend the appeal she would be obliged to pay compensation for counsel's services, that she was without income or funds other than those being paid to her by defendant under the decree and was therefore unable to compensate her attorneys unless defendant should be ordered to pay her a reasonable amount for such purposes; and she therefore sought an order on defendant to pay her for her attorneys such compensation for services as, in the judgment of the chancellor, would be reasonable and proper. No order was entered on that petition, but after the Supreme court had filed its opinion on April 10, 1940, plaintiff had leave to file a further petition wherein she repeated the essential allegations of the prior pleading and alleged that she had been put to considerable expense, which was itemized in her statement attached to the petition, that as a result of that proceeding the matter had been finally disposed of by the Supreme court, that she had been awarded \$250 on account, which was paid by defendant, and she asked that an order be entered by the chancellor directing defendant to pay such further sum as the court might adjudge to be reasonable, together with the aggregate of \$201.50, which she had laid out and expended in defending the Supreme court proceeding. Defendant's answer to that petition averred, inter alia, that the Superior court was without jurisdic-

court, the sum of \$250, which is paid by check, accompanied by a
 letter saying that the payment was "to be applied upon such an-
 debtors as may ultimately be determined to be due from Mr. A.
 C. Wheeler to Mrs. Goldie Wheeler under and pursuant to divorce
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 another petition in the Superior court reciting the decree, the
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 Supreme court allowing the appeal, and alleging that in the
 ordinary course of the hearing she would be required to file in
 the Supreme court printed briefs and to appear by her counsel on
 oral argument of the case; that in order properly to defend the
 appeal she would be obliged to pay compensation for counsel's
 services, that she was without income or funds other than those
 being paid to her by defendant under the decree and was therefore
 unable to compensate her attorneys unless defendant should be
 ordered to pay her a reasonable amount for such purposes; and she
 therefore sought an order on defendant to pay her for her attorneys
 such compensation for services as, in the judgment of the Chancellor,
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 ing and alleged that she had been put to considerable expense, which
 was itemized in her statement attached to the petition, that as a
 result of that proceeding the matter had been finally disposed of
 by the Supreme court, that she had been awarded \$150 on account,
 which was paid by defendant, and she asked that an order be entered
 by the Chancellor directing defendant to pay such further sum as the
 court might adjudge to be reasonable, together with the aggregate
 of \$201.50, which she had laid out and expended in defending the
 Supreme court proceeding. Defendant's answer to that petition
 averred, inter alia, that the Superior court was without jurisdic-

tion to enter an order requiring him to pay fees for services rendered in the Supreme court, and he asked that the prayer of the petition be disallowed. A hearing was had by the chancellor, who awarded Mrs. Buchler \$1,915 for services necessarily rendered by her solicitors, together with the amount of \$185 as expenses, or an aggregate of \$2,100. Defendant thereupon prosecuted the first of the five appeals hereinbefore referred to, challenging the jurisdiction of the Superior court to enter such an order and contending that the award was excessive. We reduced the amount allowed plaintiff as fees for her solicitors to \$1,000 and affirmed the order in all other respects (Appellate court case No. 41682, 313 Ill. App. 264 (Abst.).) Thereupon defendant sought leave to appeal to the Supreme court from the judgment order here entered, but his petition was denied June 10, 1942. (Ill. Sup. Ct. Gen. No. 26709.)

The second of the five appeals, General No. 41708, involved a controversy in respect to the division between the parties of charges incurred with reference to their Kenilworth residence which had been awarded to them in equal interest, with the provision that the property be sold as soon as convenient. The Chicago Real Estate Board Appraisal Committee, which was appointed by agreement of the parties, placed a valuation of \$25,000 on the premises. Plaintiff was unable to sell the property at the appraised figure, and thereupon defendant offered to purchase her interest, less certain advancements made by him on account of interest, taxes and principal payments. There was a mortgage of \$15,000 on the property, and upon the basis of the \$25,000 valuation defendant computed that the parties had an equity, after deducting the mortgage, interest and principal payments, amounting to \$8,247.35; and after subtracting what he contended was Mrs. Buchler's share of the interest, taxes and principal payments, he computed her equity in the residence at \$535.34, which he offered to pay her. She

tion to enter an order requiring him to pay fees for services rendered in the supreme court, and he asked that the prayer of the petition be disallowed. A hearing was had by the chancellor, who awarded Mrs. Bushler \$1,917 for services necessarily rendered by her solicitors, together with the amount of 18% as expenses, or an aggregate of \$2,100. Defendant thereupon prosecuted the first of the five appeals heretofore referred to, challenging the jurisdiction of the superior court to enter such an order and contending that the award was excessive. We reduced the amount allowed plaintiff as fees for her solicitors to \$1,000 and affirmed the order in all other respects (Appellate court case No. 41682, 313 Ill. App. 2d (4th Div.)). Thereupon defendant sought leave to appeal to the supreme court from the judgment order here entered, but his petition was denied (June 10, 1942. (Ill. Sup. Ct. Gen. No. 26709)).

The second of the five appeals, General No. 41708, involved a controversy in respect to the division between the parties of charges incurred with reference to their jointly owned residence which had been awarded to them in equal interest, with the provision that the property be sold as soon as convenient. The Chicago Real Estate Board Appraisal Committee, which was appointed by agreement of the parties, placed a valuation of \$25,000 on the premises. Plaintiff was unable to sell the property at the appraised figure, and thereupon defendant offered to purchase her interest, less certain advancements made by him on account of interest, taxes and principal payments. There was a mortgage of \$17,000 on the property, and upon the basis of the \$25,000 valuation defendant computed that the parties had an equity, after deducting the mortgage, interest and principal payments, amounting to \$8,247.50; and after subtracting what he contended was Mrs. Bushler's share of the interest, taxes and principal payments, he computed her equity in the residence at \$535.34, which he offered to pay her. The

declined the offer, contending that his interpretation of the decree resulted in improperly charging her with payments which materially affected her equity in the property to the extent of several hundred dollars. Defendant thereupon filed a petition in the Superior court asking for a construction of the decree with respect to the liabilities of the parties to pay taxes, interest and other charges, pending the sale. To this petition plaintiff filed her answer, and upon hearing of the matter the court entered an order construing the decree, from which defendant appealed. We affirmed the order entered by the chancellor in 313 Ill. App. 265 (Abst.).

During the hearing of that controversy before the chancellor plaintiff filed a petition asking for an order on defendant to pay her as and for her attorneys' fees for the services necessarily required to defend the petition seeking a construction of the decree, and was awarded \$250. Defendant thereupon prosecuted the third of the five appeals, General No. 41709. The amount of the fees allowed was not challenged, but he contended that there was no statutory authority by which a court might require the husband to pay solicitors' fees to his wife for matters touching their property after a decree of divorce had been entered. We affirmed the chancellor's order in 313 Ill. App. 265 (Abst.).

While the appeals in causes numbered 41682, 41708 and 41709 were pending, plaintiff filed her petition seeking allowance for expenses and attorneys' fees for services rendered by her counsel in respect to those three appeals. She claimed that she was without funds or property of any kind or nature other than the alimony payments she received from defendant, and that all the money awarded her was used in the maintenance of her home and in support of herself and her children. A hearing was had, pursuant to which the chancellor allowed plaintiff attorneys' fees in cause No. 41682 of \$200 and expenses of \$21.40; in cause No. 41708 the sum of \$300 for attorneys' fees and \$17.50 for expenses; in cause No. 41709

declined the offer, contending that his interpretation of the decree resulted in improperly charging her with payments which materially affected her equity in the property to the extent of several hundred dollars. Defendant thereupon filed a petition in the Superior court asking for a construction of the decree with respect to the liabilities of the parties to pay taxes, interest and other charges, pending the sale. To this petition plaintiff filed her answer, and upon hearing of the latter the court entered an order construing the decree, from which defendant appealed. We affirmed the order entered by the chancellor in 313 Ill. App. 2d (Abst.).

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the sum of \$200 as attorneys' fees and \$38.75 for expenses, or an aggregate of \$777.65. The present appeal was taken by defendant from that award.

Although defendant raises nine separate points as ground for reversal, his counsel concede that his "theory of the case is based, primarily, on the proposition that no statutory or other power exists to authorize the Superior Court to enter an order, on a petition filed subsequent to a final decree for divorce, requiring a divorced spouse to pay attorney's fees or expenses incurred by the other party to the severed marriage relationship covering proceedings occurring subsequent to said final decree for divorce." The same contention was made in case No. 41682, as shown by defendant's brief, which was received in evidence in this proceeding. His counsel there relied on par. 16, chap. 40, Illinois Revised Statutes 1939, as affording no jurisdiction or authority to allow attorney's fees or expenses covering proceedings occurring subsequent to the final decree for divorce, and cited and discussed some of the same decisions. Construing the statute, as we understood it, with supporting authority, we held that the court which entered the decree had power to make the award, and indicated that defendant was "in no position to question the authority of the Superior court to allow attorneys' fees and suit money" because he had complied with the court's prior order to pay \$250 on account, without questioning its authority or jurisdiction by appealing from that order and that the order therefore "constituted an adjudication, fixing the rights of the parties in the matter of fees for attorneys' services."

In case No. 41709, defendant's counsel again argued the same legal proposition under the heading that "There is no statutory authority by which a court may require the husband to pay solicitor's fees to his wife for matters touching their property after a decree of divorce has been entered," and the identical decisions now cited

the sum of \$200 as attorneys' fees and \$38.75 for expenses, or an aggregate of \$238.75. The present appeal was taken by defendant from that award.

Although defendant raises nine separate points as grounds for reversal, his counsel concede that his "theory of the case is based, primarily, on the proposition that no statutory or other power exists to authorize the Superior Court to enter an order, on a petition filed subsequent to a final decree for divorce, requiring a divorced spouse to pay attorney's fees or expenses incurred by the other party to the severed marriage relationship covering proceedings occurring subsequent to said final decree for divorce." The same contention was made in case No. 41602, as shown by defendant's brief, which was received in evidence in this proceeding. His counsel there relied on par. 16, chap. 40, Illinois Revised Statutes 1939, as affording no jurisdiction or authority to allow attorney's fees or expenses covering proceedings occurring subsequent to the final decree for divorce, and cited and discussed some of the same decisions. Construing the statute, as we understood it, with supporting authority, we held that the court which entered the decree had power to make the award, and indicated that defendant was "in no position to question the authority of the Superior Court to allow attorneys' fees and suit money" because he had complied with the court's prior order to pay \$250 on account, without questioning its authority or jurisdiction by appealing from that order and that the order therefore "constituted an adjudication fixing the rights of the parties in the matter of fees for attorneys' services."

In case No. 41709, defendant's counsel again argued the same legal proposition under the heading that "there is no statutory authority by which a court may require the husband to pay solicitor's fees to his wife for matters touching their property after a decree of divorce has been entered," and the identical decisions now cited

were fully argued. We held that the award of \$250 as fees for defending defendant's petition with respect to Mrs. Buehler's equity in the Kenilworth property was justified under the authorities cited and affirmed the order. Defendant's counsel now seek "another judicial review of the question as to whether the court has power to allow expenses when no application for the same was filed during the pendency of a divorce suit." Having twice passed on the question, arising between the same parties and growing out of the same decree, we think that the matter has been sufficiently adjudicated, and that the seemingly interminable litigation as to plaintiff's right to be compensated for attorneys' fees in defending the numerous petitions presented to the court, should be brought to a close. She has no funds of her own with which to protect her interests, and as was pointed out in case No. 41709, "if Mrs. Buehler were required to defend these orders at her own expense out of the meager allowance made her, it is well conceivable that she might be rendered helpless to protect her interest under the decree. Under the authorities cited we are of opinion that she is entitled to be reimbursed for her reasonable solicitors' fees in defending these orders." Moreover, the prior decisions being res adjudicata of the question presented, we see no reason why the principle should not be invoked against defendant. In the leading case of Hanna et al. v. Read et al., 102 Ill. 596, the court made the following pertinent comment, which we think is applicable to this case: "Whether the adjudication relied on as an estoppel goes to a single question, or all the questions involved in a cause, the fundamental principle upon which it is allowed in either case is, that justice and public policy alike demand that a matter, whether consisting of one or of many questions, which has been solemnly adjudicated by a court of competent jurisdiction, shall be deemed finally and conclusively settled in any subsequent litigation between the same parties, where the same question or questions arise, except where the litigation is a direct proceeding for the purpose of reversing or

were fully argued. We held that the award of \$250 as fees for

defending defendant's petition with respect to Mrs. Buehler's

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on the question, arising between the same parties and growing out

of the same decree, we think that the matter has been sufficiently

adjudicated, and that the seemingly interminable litigation as to

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to a close. She has no funds of her own with which to protect her

interests, and as was pointed out in case No. 41709, "If Mrs. Buehler

were required to defend these orders at her own expense out of the

meager allowance made her, it is well conceivable that she might

be rendered helpless to protect her interest under the decree.

Under the authorities cited we are of opinion that she is entitled

to be reimbursed for her reasonable solicitors' fees in defending

these orders." Moreover, the prior decisions being res adjudicata

of the question presented, we see no reason why the principle should

not be invoked against defendant. In the leading case of Hanna et al.

v. Read et al., 102 Ill. 596, the court made the following pertinent

comment, which we think is applicable to this case: "Whether the

adjudication relied on as an estoppel goes to a single question, or

all the questions involved in a cause, the fundamental principle

upon which it is allowed in either case is, that justice and public

policy alike demand that a matter, whether consisting of one or of

many questions, which has been solemnly adjudicated by a court of

competent jurisdiction, shall be deemed finally and conclusively

settled in any subsequent litigation between the same parties,

where the same question or questions arise, except where the litig-

ation is a direct proceeding for the purpose of reversing or

setting aside such adjudication."

Defendant's remaining contentions require little consideration. He complains that the attorneys' fees of \$777.65, allowed in the three appeals, are excessive; that no showing was made as to the necessity of the expenditure of time shown; that the evidence with reference to plaintiff's necessitous circumstances was insufficient to support the order; and that the allowance of attorneys' fees must be based on allegations in the petition and evidence showing that defendant has the pecuniary ability to pay them. There is abundant evidence as to the reasonableness of the fees. Two of plaintiff's counsel testified as to the services rendered and as to the time necessarily spent in examining the various questions raised, preparing briefs and arguing the several cases. The respective briefs and abstracts in all three cases were introduced in evidence, and from an examination of the record and our own familiarity with the three appeals, we have no hesitation in holding that the sums awarded were extremely reasonable. With respect to plaintiff's necessitous circumstances, it would be idle to contend that she is able to retain and pay counsel for defending the numerous appeals taken, out of her monthly allowance of \$175. Her equity in the Kenilworth property has substantially no value. Defendant's counsel say that she is the owner of 53 shares of Buehler Brothers' stock, a company in which her husband is interested. Defendant has stated on various occasions in the course of these appeals that the stock pays no dividends and has no ready market value, and plaintiff testified that "I have no money from any other source [than alimony]. I spend the entire \$175." So far as defendant's pecuniary ability to pay the fees is concerned, it was conceded on oral argument of the accompanying appeal No. 42393 that defendant's personal income is now in excess of \$16,000 a year, and plaintiff's counsel insist that it is \$21,000. If he cannot pay \$777.65 out of that income, making allowance, of course, for the numerous other expenses that he testified to, it

setting aside such adjustment."

Defendant's remaining contentions require little con-

sideration. He complains that the attorneys' fees of \$777.65,

allowed in the three appeals, are excessive; that no showing

was made as to the necessity of the expenditure of time shown;

that the evidence with reference to plaintiff's necessities cir-

cumstances was insufficient to support the order; and that the

allowance of attorneys' fees must be based on allegations in the

petition and evidence showing that defendant has the pecuniary

ability to pay them. There is abundant evidence as to the reason-

ableness of the fees. Two of plaintiff's counsel testified as to

the services rendered and as to the time necessarily spent in

examining the various questions raised, preparing briefs and arguing

the several cases. The respective briefs and abstracts in all three

cases were introduced in evidence, and from an examination of the

record and our own familiarity with the three appeals, we have no

hesitation in holding that the sums awarded were extremely reason-

able. With respect to plaintiff's necessities circumstances, it

would be idle to contend that she is able to retain and pay counsel

for defending the numerous appeals taken, out of her monthly allow-

ance of \$175. Her equity in the Kaniworth property has substantially

ly no value. Defendant's counsel say that she is the owner of 25

shares of Buehler Brothers' stock, a company in which her husband

is interested. Defendant has stated on various occasions in the

course of these appeals that the stock pays no dividends and has

no ready market value, and plaintiff testified that "I have no money

from any other source [than alimony]. I spend the entire \$175."

Be far as defendant's pecuniary ability to pay the fees is con-

cerned, it was conceded on oral argument of the accompanying ap-

peal, No. 42393, that defendant's personal income is not in excess of

\$16,000 a year, and plaintiff's counsel insist that it is \$21,000.

If he cannot pay \$777.65 out of that income, making allowance, of

course, for the numerous other expenses that he testified to, it

is difficult to perceive how he can expect Mrs. Buehler to pay that sum out of \$175 a month.

For the reasons indicated we are of opinion that the order of the Superior court was proper. It is therefore affirmed.

ORDER AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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that sum out of \$175 a month.

For the reasons indicated we are of opinion that the
order of the Superior Court was proper. It is therefore
affirmed.

ORDER AFFIRMED.

Sullivan, P. J., and Scamman, J., concur.

42393

GOLDIE BUEHLER,
Appellee,

v.

ALBERT C. BUEHLER,
Appellant.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

318 I.A. 641

323

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In October 1937 plaintiff obtained a divorce from defendant by decree of the Superior court on the ground of cruelty. Plaintiff was awarded a monthly allowance of \$175 as permanent alimony, and \$75 a month for each of two children who were entrusted to her care. The custody of two other children was awarded to defendant. The decree was affirmed in all respects by the Supreme court in Buehler v. Buehler, 373 Ill. 626.

This proceeding was initiated by defendant's petition of September 23, 1941, for a reduction of the support money payable to plaintiff under the original decree. When the application was made the chancellor ordered defendant to pay \$250 solicitors' fees on account, and he complied with that order. Thereafter plaintiff answered his petition, denying that he was entitled to the relief sought, and she filed a cross-petition for an increase of alimony, which defendant answered. The two matters were referred to a special commissioner who, after a hearing which embraced almost 400 pages of testimony, recommended that plaintiff's alimony remain at \$175 a month, that the monthly payment of \$75 for Albert, Jr., who was attending Dartmouth College at the father's expense, be abated, and that no fees be allowed plaintiff's attorneys in addition to the amount already paid. When the exceptions to the commissioner's report came on for hearing before Judge Lewé, to whom the matter had been assigned, he entered an order increasing plaintiff's permanent alimony to \$225 a month, and allowed her as solicitors' fees an additional \$300. Defendant's appeal from that order constitutes his fifth appeal from various orders arising

GOLDIE BUEHLER, Appellee,
v.
ALBERT C. BUEHLER, Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.
3181A.641

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In October 1937 plaintiff obtained a divorce from defendant by decree of the Superior Court on the ground of cruelty. Plaintiff was awarded a monthly allowance of \$175 as permanent alimony, and \$75 a month for each of two children who were entrusted to her care. The custody of two other children was awarded to defendant. The decree was affirmed in all respects by the Supreme Court in Buehler v. Buehler, 373 Ill. 626.

This proceeding was initiated by defendant's petition of September 23, 1941, for a reduction of the support money payable to plaintiff under the original decree. When the application was made the chancellor ordered defendant to pay \$250 solicitors' fees on account, and he complied with that order. Thereafter plaintiff answered his petition, denying that he was entitled to the relief sought, and she filed a cross-petition for an increase of alimony, which defendant answered. The two matters were referred to a special commissioner who, after a hearing which embraced almost 400 pages of testimony, recommended that plaintiff's alimony remain at \$175 a month, that the monthly payment of \$75 for Albert, Jr., who was attending Dartmouth College at the father's expense, be abated, and that no fees be allowed plaintiff's attorneys in addition to the amount already paid. When the exceptions to the commissioner's report came on for hearing before Judge Lewis, to whom the matter had been assigned, he entered an order increasing plaintiff's permanent alimony to \$225 a month, and allowed her as solicitors' fees an additional \$300. Defendant's appeal from that order constitutes his fifth appeal from various orders arising

out of the divorce proceeding since the decree was entered, and counsel agreed on oral argument that appeal No. 6 would shortly follow.

Defendant's principal source of income is derived from the Victor Adding Machine Company and Buehler Brothers Company, two corporations controlled by himself, his mother and three brothers. In affirming the decree the Supreme court said that in 1930 and 1931 defendant had a gross income of \$25,000 to \$35,000, which had been reduced during 1935 and 1936 to about \$13,000. It was conceded by defendant, both in his brief and on oral argument, that this income has now been increased to \$16,500, and plaintiff insists that his annual earnings are \$21,000; accordingly her counsel have assigned cross-error asking that her permanent alimony be increased to \$400 a month, and that she be allowed \$650 solicitors' fees in addition to the \$300 increase awarded them by the chancellor.

It is significant that although defendant's petition sought a reduction in the support money of \$175 a month, he is now satisfied with the conclusions of the commissioner who recommended that plaintiff's alimony be not reduced, and that the decree be modified only with respect to the payment of \$75 a month for the support of Albert, Jr., a modification which would undoubtedly have been approved by the chancellor without a protracted hearing, if defendant had asked for it. We emphasize this circumstance because all through defendant's briefs, not only in this proceeding but in several of the other appeals, he complains of plaintiff's unreasonableness and that of her counsel, and asserts that the protracted litigation is necessitated by plaintiff's unwillingness to co-operate.

In his petition for the reduction of alimony, defendant assigns "the curtailment of defendant's income" as one of the circumstances requiring such an order, and he alleges that his earnings for the year 1941 "consisted only of salary, less necessary business expenditures, of \$13,500." It is difficult to reconcile that

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Defendant's principal source of income is derived from the Victor Adding Machine Company and Bushler Brothers Company, two corporations controlled by himself, his mother and three brothers. In affirming the decree the Supreme Court said that in 1930 and 1931 defendant had a gross income of \$25,000 to \$35,000, which had been reduced during 1932 and 1936 to about \$13,000. It was conceded by defendant, both in his brief and on oral argument, that this income has now been increased to \$16,500, and plaintiff insists that his annual earnings are \$21,000; accordingly her counsel have assigned gross-error asking that her permanent alimony be increased to \$400 a month, and that she be allowed \$650 solicitors' fees in addition to the \$300 increase awarded them by the chancellor.

It is significant that although defendant's petition sought a reduction in the support money of \$175 a month, he is now satisfied with the conclusions of the commissioner who recommended that plaintiff's alimony be not reduced, and that the decree be modified only with respect to the payment of \$75 a month for the support of

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In his petition for the reduction of alimony, defendant assigns "the curtailment of defendant's income" as one of the circumstances requiring such an order, and he alleges that his earnings for the year 1941 "consisted only of salary, less necessary business expenditures, of \$13,500." It is difficult to reconcile that

allegation with his testimony upon the hearing and the admission of his attorneys on oral argument that his salary for 1941 was \$16,500, less a trivial amount deducted for social security taxes and insurance benefits. Plaintiff's counsel spent much time trying to elicit from defendant an admission that he receives an additional \$375 a month, which would make a total salary of \$21,000, and plaintiff insists that the evidence would warrant such a finding. However, giving him the benefit of his own testimony and the admission of his counsel, there can be no doubt that his income of approximately \$13,000 in 1935 and 1936, as found by the original decree and approved by the Supreme court, had been enhanced to the extent of about \$3,500 by 1941. Upon this state of the record we think the chancellor was entirely warranted in increasing plaintiff's permanent alimony ~~xx~~ \$50 a month, or \$600 a year, as against an annual increase in his earnings of more than \$3,000 since the decree was entered.

Defendant estimated his current annual business expenses at \$2,000, and he contends that his salary of \$16,500 is accordingly reduced by that amount. On the original hearing for divorce he claimed that his annual business expenses were \$3,000, and that his gross income in 1935 and 1936 was \$12,000 to \$13,500. It would therefore appear that the proportionate increase in his earnings for 1941 would be even greater than the increase in his salary of \$3,000.

Against these increased earnings defendant has been relieved of certain obligations which existed when the original decree was entered. The Kenilworth home, which was awarded to the parties in equal interest, is being foreclosed, and defendant is no longer required to pay interest on the mortgage, which in 1936 amounted to \$1,000, and taxes on the property, which were approximately \$500 during that year. According to his own testimony, his life insurance premiums were reduced from \$1,725 in 1936 to \$1,300 in 1941. In his petition for the reduction of alimony he alleged that

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the oldest child, Carl, who was then 21 and is now going on 23 years of age, was a student at Illinois Institute of Technology, but Carl had evidently completed that course or abandoned it at the time of the hearing, because he was then employed by the Victor Adding Machine Company, which was manufacturing defense material for the United States Government, and was self-supporting.

Another reason assigned by defendant for the necessity of reducing plaintiff's support money is the "increasing personal indebtedness incurred to defray expenses properly payable out of ordinary income," and considerable time and effort was devoted upon hearing to the introduction of evidence as to his indebtedness in 1941 as a basis for comparison with 1936. It is impossible to draw any accurate conclusions from the evidence as to what defendant really owes. He claims that his debts increased from \$31,000 in 1936 to \$82,000 in 1941, but he includes in the larger amount such items as the \$15,000 mortgage on the Kenilworth home, which was amply secured and is being foreclosed, large sums borrowed for defraying legal expenses incurred since the original decree, an item of some \$8,600 representing interest on a running account extending over many years with the Victor Adding Machine Company, which was never charged to him nor paid by him, and various lesser items which were modified by him in the course of his examination.

On the credit side the status of defendant's assets is somewhat involved. Part of the dividends which he formerly derived from the two family corporations were, by contract, required to be paid to the Buehler Personal Property Trust, created for the support of his mother, to which the three brothers also made contributions. Defendant testified that he never derived any income from that trust, but it appears from the record in the original case that he received \$353.70 in dividends in 1935. His counsel admit that he overlooked this item but urge that he "should be excused for this oversight" because the incident occurred in 1935. Defendant also testified that the Buehler Trust had, since December 31, 1935,

the oldest child, Carl, who was then 21 and is now going on 23 years of age, was a student at Illinois Institute of Technology, but Carl had evidently completed that course or abandoned it at the time of the hearing, because he was then employed by the Victor Adding Machine Company, which was manufacturing defense material for the United States Government, and was self-supporting. Another reason assigned by defendant for the necessity of reducing plaintiff's support money is the "increasing personal indebtedness incurred to defray expenses properly payable out of ordinary income," and considerable time and effort was devoted upon hearing to the introduction of evidence as to his indebtedness in 1941 as a basis for comparison with 1936. It is impossible to draw any accurate conclusions from the evidence as to what defendant really owes. He claims that his debts increased from \$31,000 in 1936 to \$82,000 in 1941, but he includes in the larger amount such items as the \$15,000 mortgage on the Kenilworth home, which was amply secured and is being foreclosed, large sums borrowed for defraying legal expenses incurred since the original decree, an item of some \$8,600 representing interest on a running account extending over many years with the Victor Adding Machine Company, which was never charged to him nor paid by him, and various lesser items which were modified by him in the course of his examination. On the credit side the status of defendant's assets is somewhat involved. Part of the dividends which he formerly derived from the two family corporations were, by contract, required to be paid to the Buehler Personal Property Trust, created for the support of his mother, to which the three brothers also made contributions. Defendant testified that he never derived any income from that trust, but it appears from the record in the original case that he received \$353.70 in dividends in 1935. His counsel admit that he overlooked this item but urge that he "should be excused for this oversight" because the incident occurred in 1935. Defendant also testified that the Buehler Trust had, since December 31, 1935,

received dividends on its securities amounting to \$39,549.76, and in spite of plaintiff's contention that his one-fifth share thereof was "to be had for the asking," defendant claims that he received no part thereof. In 1941 he sold real estate known as Howell's Villa, for which he received \$3,945.61, less attorneys' fees of about \$150, and in 1938 he also sold his share of a division of the Buehler real estate near McHenry, Illinois, for \$30,000 less expenses. With the proceeds from that sale he created the so-called Zander Trust, which provides that the income from its assets shall be payable to him, and he testified that he had received \$322.50 as dividends since the trust was formed. Manifestly, he could have applied some of these profits and dividends toward the payment of his debts and reduced his liabilities by at least \$30,000, which would have left his liabilities in 1941 no greater, or perhaps even less, than they were in 1936, but although he urges his mounting indebtedness as the reason for reducing plaintiff's support money, no explanation is offered for not doing so. Evidently, the debts to his brother and to the family corporation are not so pressing as his counsel would have us believe when they say that "the demands on Mr. Buehler for funds was so great that his borrowings have necessarily increased the amount of his indebtedness," and "If it were not for his ability to borrow, his property would be largely depleted by now." His counsel's dire foreboding that "The obligation of over \$10,000 owing to Mr. Buehler's brother, Robert, is in friendly hands, but some time Mr. Buehler is going to have to take this indebtedness into account in settling matters with his brother which may mean a transfer by Mr. Buehler to his brother of some of his capital assets in payment of this indebtedness," may be only a prophecy of events to come.

The third principal reason urged for further cutting plaintiff's support money is "the reduced living expenses of plaintiff." Mrs. Buehler now resides with her parents in a home at 819 Prairie avenue, Wilmette, Illinois, purchased by them from the H.O.L.C. in

received dividends on its securities amounting to \$39,249.76, and in spite of plaintiff's contention that his one-fifth share thereof was "to be had for the asking," defendant claims that he received no part thereof. In 1941 he sold real estate known as Howell's Villa, for which he received \$3,947.61, less attorneys' fees of about \$150, and in 1938 he also sold his share of a division of the Buehler real estate near McHenry, Illinois, for \$30,000 less expenses. With the proceeds from that sale he created the so-called Zander Trust, which provides that the income from its assets shall be payable to him, and he testified that he had received \$322.50 as dividends since the trust was formed. Manifestly, he could have applied some of these profits and dividends toward the payment of his debts and reduced his liabilities by at least \$30,000, which would have left his liabilities in 1941 no greater, or perhaps even less, than they were in 1936, but although he urges his mounting indebtedness as the reason for reducing plaintiff's support money, no explanation is offered for not doing so. Evidently, the debts to his brother and to the family corporation are not so pressing as his counsel would have us believe when they say that "the demands on Mr. Buehler for funds was so great that his borrowings have necessarily increased the amount of his indebtedness," and "if it were not for his ability to borrow, his property would be largely depleted by now." His counsel's dire foreboding that "The obligation of over \$10,000 owing to Mr. Buehler's brother, Robert, is in friendly hands, but some time Mr. Buehler is going to have to take this indebtedness into account in settling matters with his brother which may mean a transfer by Mr. Buehler to his brother of some of his capital assets in payment of this indebtedness," may be only a prophecy of events to come.

The third principal reason urged for further cutting plaintiff's support money is "the reduced living expenses of plaintiff." Mrs. Buehler now resides with her parents in a home at 819 Prairie Avenue, Wilmette, Illinois, purchased by them from the E.O.L.C. in

October 1940 on long time installments. She and her mother do the housework, cooking and other work around the home, without hired help. For a time they employed a laundress to assist them, but they were obliged to let her go. They have taken in a Mrs. Nielson and her son, who pay Mr. Hallquist (plaintiff's father) \$50 a month for two rooms, and defendant's counsel ask that this amount be considered as additional income. The evidence discloses that plaintiff pays her share of the household expenses, that no part of her support money is used toward paying the installments on the home, and that all of the support money she receives from defendant is necessarily spent for her own maintenance. Defendant, on the other hand, appears not to have suffered any reduction in his own living conditions. In July 1941 he moved from a house that he had theretofore occupied and for which he paid a monthly rental of \$115, to a house where the monthly rental is \$200. He still operates two automobiles, one of which he says belongs to the family corporation, stables one or two horses, retains membership in the Barrington Country Club and the Chicago Athletic Association, employs a couple in the household to whom he pays \$90 a month, and maintains charge accounts in various stores in Chicago, Elgin and Barrington, bills for which, running into considerable amounts, he produced on the request of plaintiff's counsel.

In summation, defendant says that his income "increased slightly in 1941 over his income at the time the divorce decree was rendered," which "is offset by the increase in his Federal income taxes, his expenses on account of his children and his personal indebtedness," and his counsel conclude that "The result is that Mr. Buehler's pecuniary ability to pay is less now than in 1937. His family expenses have increased because of the shifting of the burden to him of supporting Barbara and Bert, both of whom are attending college where the payment of board and room rent for each of them outside of defendant's home is required." They omit

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to say, however, that he is no longer required to pay Mrs. Buehler \$75 a month for the support each of Barbara and Bert, nor to pay \$1,600 a year which he had previously been expending for the education and support of Carl. By reason of defendant's change in attitude since his petition was filed, it becomes unnecessary to consider or discuss his original request that plaintiff's support money of \$175 a month be further reduced. There remains only the question whether the chancellor was justified upon the record in increasing plaintiff's support money to \$225 a month. The Supreme court in its opinion (Buehler v. Buehler, 373 Ill. 626) pointed out that the trial court had retained jurisdiction of the cause, "and if circumstances should change it would be within its power to adjust the alimony and support money in accordance with changed conditions." We think the record abundantly justifies the increase, but we are not inclined to hold, under the assignment of plaintiff's cross-error, that the amount should be still further increased at the present time.

There remains only the question of the allowance of solicitors' fees. The point is again made by defendant, but not argued, that there is no statutory authority by which a court may require an ex-husband to pay attorneys' fees to his ex-wife covering matters arising subsequent to a final decree for divorce. We have already passed on this question in three of the preceding appeals. Moreover, the chancellor in this proceeding ordered defendant to pay plaintiff \$250 on account, and that order was complied with. Under similar circumstances we held, in case No. 41682, that a payment on account constituted res adjudicata, and the same principle governs the situation now presented. The chancellor awarded Mrs. Buehler an additional \$300 for services in connection with defendant's petition and plaintiff's counter-complaint. As heretofore indicated, defendant's petition necessitated a protracted hearing which required plaintiff's counsel to enter upon an investigation with respect to defendant's personal income, his debts and his expenses, as

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well as Mrs. Buehler's circumstances, and the evidence showed, without contradiction, that her counsel devoted 65 hours, either in actual trial or in matters incidental to the preparation thereof. They added to this an estimated 15 hours' work, which included the examination and abstracting of the record preparatory to the argument before the commissioner and the chancellor, the drawing of objections and exceptions to his report, and the time consumed in presenting them, first to the commissioner and later to the court. One of plaintiff's counsel testified that the services were reasonably worth \$15 an hour, and it was stipulated by counsel that other lawyers who would be called to testify, would corroborate his testimony. No countervailing proof was introduced as to the extent or value of the services rendered. It thus appears that plaintiff's counsel have been awarded an aggregate of \$550, of which \$250 has been paid, and they ask an additional \$650 to the \$300 increase allowed by Judge Lewe. The aggregate time necessarily spent by them was 80 hours. On the basis of compensation shown by counsel's evidence, the additional amount allowed is extremely reasonable, since most of the evidence was taken under defendant's petition. However, because part of the services were rendered in connection with plaintiff's counterclaim, it is impossible to separate the services required under the two petitions, and therefore we would not be justified in further increasing the amount allowed by the chancellor.

For the reasons given, the court's order of April 23, 1942, should be affirmed. It is so ordered.

ORDER AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

well as Mrs. Buehler's circumstances, and the evidence showed, without contradiction, that her counsel devoted 6 1/2 hours, either in actual trial or in matters incidental to the preparation thereof. They added to this an estimated 1 1/2 hours' work, which included the examination and abstracting of the record preparatory to the argument before the commissioner and the chancellor, the drawing of objections and exceptions to his report, and the time consumed in presenting them, first to the commissioner and later to the court. One of plaintiff's counsel testified that the services were reasonably worth \$15 an hour, and it was stipulated by counsel that other lawyers who would be called to testify, would corroborate his testimony. No counterclaiming proof was introduced as to the extent or value of the services rendered. It thus appears that plaintiff's counsel have been awarded an aggregate of \$250, of which \$250 has been paid, and they ask an additional \$650 to the \$300 increase allowed by Judge Lowe. The aggregate time necessarily spent by them was 80 hours. On the basis of compensation shown by counsel's evidence, the additional amount allowed is extremely reasonable, since most of the evidence was taken under defendant's petition. However, because part of the services were rendered in connection with plaintiff's counterclaim, it is impossible to separate the services rendered under the two petitions, and therefore we would not be justified in further increasing the amount allowed by the chancellor.

For the reasons given, the court's order of April 23,

1942, should be affirmed. It is so ordered.

ORDER AFFIRMED.

Sullivan, P. J., and Scannlan, J., concur.

42444

SAM MIRZA,
Appellee,

v.

ELIZABETH MIRZA,
Appellant.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

318 I.A. 641

2
324

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In cause No. 42251, the opinion in which is filed concurrently with this opinion, defendant appealed from that portion of the decree awarding her husband ten dollars a week alimony in lieu of his dower interest in and to certain real estate to which he held title, and the sum of \$200 as and for his attorney's fees and costs. While that appeal was pending plaintiff filed a petition for the allowance of attorney's fees in defending the appeal, and the trial court directed her to pay him the sum of \$300 for that purpose. She appealed from that order and the two causes^{were}/here consolidated on motion of defendant.

Plaintiff filed no brief in this proceeding and has taken no steps to defend the appeal. Under the circumstances he is not entitled to any allowance. Whipple v. Whipple, 145 Ill. App. 228.

The order appealed from is therefore reversed.

ORDER REVERSED.

Sullivan, P. J., and Scanlan, J., concur.

SAM MIREA,
Appellee,

v.

ELIZABETH MIREA,
Appellant.

WILLIAM FREDERICK SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In cause No. 42351, the opinion in which is filed con-
currently with this opinion, defendant appealed from that portion
of the decree awarding her husband ten dollars a week alimony in
lieu of his dower interest in and to certain real estate to which
he held title, and the sum of \$200 as and for his attorney's
fees and costs. While that appeal was pending plaintiff filed
a petition for the allowance of attorney's fees in defending
the appeal, and the trial court directed her to pay him the sum
of \$300 for that purpose. The appeal from that order and the
two causes^{were} here consolidated on motion of defendant.

Plaintiff filed no brief in this proceeding and has taken
no steps to defend the appeal. Under the circumstances he is
not entitled to any allowance. Whipple v. Whipple, 145 Ill. App.

228.

The order appealed from is therefore reversed.

ORDER REVERSED.

Sullivan, P. J., and Geismar, J., concur.

42059

318 LA. 642¹

STANLEY J. ALBANY, SAM ALBANY
and H. COHEN, copartners, doing
business under the name and style
of Consumers Insulating and Roof-
ing Company,

Appellees,

v.

DAVID I. PHILLIPS,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

325

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Judgment by confession was entered against defendant for \$200 upon a promissory note executed by defendant. Defendant, in apt time, made a motion, supported by a verified petition, asking that the judgment be vacated. The motion was overruled and defendant appeals.

Plaintiffs' statement of claim alleges that there is \$175 due on the promissory note attached to the statement, together with \$25 for attorney's fees. The following is the verified petition filed by defendant:

"(1) Your petitioner, David I. Phillips, respectfully represents that he is the defendant in the above entitled cause.

"(2) Your petitioner further represents that on July 17, 1941, a judgment by confession in the amount of \$200.00 and cost was entered in the above entitled cause in behalf of plaintiffs and against the defendant on a promissory note executed by this petitioner.

"(3) That on July 23, 1941, your petitioner first learned of the entry of said judgment when he was served with a writ of execution by the bailiff of the Municipal Court of the City of Chicago.

"(4) Your petitioner further represents that he has a good and meritorious defense to the whole of plaintiffs' claims and that said defense is as follows:

31814-642

420529

STANLEY J. ALBANY, JAMES ALBANY
and H. CORN, copartners, doing
business under the name and style
of Consumers Insulating and Acoust-
ing Company,

Appellants,

v.

DAVID I. PHILLIPS,
Appellee.

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

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\$200 upon a promissory note executed by defendant. Defendant,
in apt time, made a motion, supported by a verified petition,
asking that the judgment be vacated. The motion was overruled
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17, 1941, a judgment by confession in the amount of \$200.00 and
cost was entered in the above entitled cause in behalf of plain-
tiff and against the defendant on a promissory note executed
by this petitioner.

"(3) That on July 23, 1941, your petitioner first
learned of the entry of said judgment when he was served with
a writ of execution by the sheriff of the Municipal Court of
the City of Chicago.

"(4) Your petitioner further represents that he has a
good and meritorious defense to the whole of plaintiff's claims
and that said defense is as follows:

"(5) That on or about May 15, 1941, the plaintiffs, who were then engaged in the roofing business, consulted this petitioner and his wife in regard to the sale and installation of a new roof on petitioner's premises, in Villa Park, Illinois; that plaintiffs' agent made false and fraudulent misrepresentation to this defendant in that said agent advised petitioner that the roof area of said premises amounted to 2200 square feet, while in fact said area amounted to only 1800 square feet; plaintiffs further represented to this petitioner that the roofing material exhibited to petitioner was of superior grade and the best obtainable, while in fact said material was of inferior quality and not suitable or adaptable to defendant's premises; that said fraudulent misrepresentations were made by the plaintiffs in order that they might obtain a greater sum from this petitioner for said material and work than was reasonable and fair.

"(6) That on or about May 17, 1941, this defendant and his wife at the request of the plaintiffs executed a purported agreement for the installation of said roof on said premises; that said purported agreement was executed by this defendant on the express condition that said agreement would not be accepted by plaintiffs until and unless defendant confirmed the terms thereof, and plaintiffs, at that time, through their agents and representative agreed with the defendant that said purported written agreement of May 17, 1941, could be cancelled at any time before the work was commenced by plaintiffs. A true and correct copy of said agreement, marked Exhibit 'A', is attached hereto and made a part of this petition.

"(7) That on or about May 19, 1941, this petitioner, when he learned of the false misrepresentation made by plaintiffs' agent exercised his right of cancellation and on that date called the offices of plaintiffs and advised them that he did not wish plaintiffs to proceed with the installation of said new roof.

"(7) That on or about May 15, 1941, the plaintiffs, who were then engaged in the roofing business, contacted this petitioner and his wife in regard to the sale and installation of a new roof on petitioner's premises, in Villa Park, Illinois; that plaintiffs' agent made false and fraudulent misrepresentation to this defendant in that said agent advised petitioner that the roof area of said premises amounted to 2200 square feet, while in fact said area amounted to only 1800 square feet; plaintiffs further represented to this petitioner that the roofing material exhibited to petitioner was of superior grade and the best obtainable, while in fact said material was of inferior quality and not suitable or adaptable to defendant's premises; that said fraudulent misrepresentations were made by the plaintiffs in order that they might obtain a greater sum from this petitioner for said material and work than was reasonable and fair.

"(8) That on or about May 17, 1941, this defendant and his wife at the request of the plaintiffs executed a purported agreement for the installation of said roof on said premises; that said purported agreement was executed by this defendant on the express condition that said agreement would not be accepted by plaintiffs until and unless defendant confirmed the terms thereof, and plaintiffs, at that time, through their agents and representative agreed with the defendant that said purported written agreement of May 17, 1941, could be cancelled at any time before the work was commenced by plaintiffs. A true and correct copy of said agreement, marked Exhibit 'A', is attached hereto and made a part of this petition.

"(9) That on or about May 19, 1941, this petitioner, when he learned of the false misrepresentation made by plaintiffs' agent exercised his right of cancellation and on that date called the offices of plaintiffs and advised them that he did not wish plaintiffs to proceed with the installation of said new roof.

"(8) That on or about the same date, to wit: May 17, 1941, at the request of plaintiffs' agent and representative, petitioner executed his note payable to plaintiffs in the amount of \$175, which note was executed by this petitioner upon the same terms and conditions as said written agreement of May 17, 1941, and was given to plaintiffs merely as security for said written agreement of May 17, 1941, which agreement was obtained by plaintiffs by means of false and fraudulent misrepresentations.

"(9) Petitioner alleges that plaintiffs' remedy, if any, should be based on said agreement dated May 17, 1941, which constitutes the entire agreement between the parties. The Court is unable to determine from the confession clause in said note, whether said work mentioned in said agreement has been performed, or how far it has progressed, and therefore the Court should not enter judgment without extrinsic evidence being heard on the part of the defendant.

"(10) Petitioner alleges that by reason of said false and fraudulent misrepresentations said agreement and said note are void and unenforceable; that because said material and labor for said new roof were never furnished nor performed, there was a lack or failure of consideration for said agreement and said note, and therefore said agreement and said note are void and unenforceable.

"Wherefore, The Defendant Prays, that the judgment by confession entered in this cause be vacated, set aside, and held for naught and that judgment be entered for the defendant in this cause."

Attached to the petition is the copy of the contract between plaintiffs and defendant, which is referred to in the petition as Exhibit "A":

"CONSUMERS INSULATING AND ROOFING COMPANY

"3110-12 South Michigan Avenue, Chicago.

"(8) That on or about the same date, to wit: May 17, 1941, at the request of plaintiffs' agent and representative, petitioner executed his note payable to plaintiffs in the amount of \$175, which note was executed by this petitioner upon the same terms and conditions as said written agreement of May 17, 1941, and was given to plaintiffs merely as security for said written agreement of May 17, 1941, which agreement was obtained by plaintiffs by means of false and fraudulent misrepresentations.

"(9) Petitioner alleges that plaintiffs' remedy, if any, should be based on said agreement dated May 17, 1941, which constitutes the entire agreement between the parties. The Court is unable to determine from the confession clause in said note, whether said work mentioned in said agreement has been performed, or how far it has progressed, and therefore the Court should not enter judgment without extrinsic evidence being heard on the part of the defendant.

"(10) Petitioner alleges that by reason of said false and fraudulent misrepresentations said agreement and said note are void and unenforceable; that because said material and labor for said new roof were never furnished nor performed, there was a lack or failure of consideration for said agreement and said note, and therefore said agreement and said note are void and unenforceable.

"Wherefore, The Defendant Prays, that the judgment by confession entered in this cause be vacated, set aside, and held for naught and that judgment be entered for the defendant in this cause."

Attached to the petition is the copy of the contract between plaintiffs and defendant, which is referred to in the petition as Exhibit "A":

"CONSUMERS INSULATING AND ROOFING COMPANY

"3110-12 South Michigan Avenue, Chicago.

-4-

"Telephone: Victory 0600

"Date: May 17th - 41

"AGREEMENT.

"The undersigned hereby requests the Consumers Insulating and Roofing Company, hereinafter called the Contractor, to furnish labor and materials necessary to install, construct, and place the improvement herein described on/in the building known and commonly designated as

"Address 624 E. Park Blvd.
"State Ill.

City-Villa Park

"According to the following specifications:

"Install exclusive Royal Red Roof over entire roof area including front and rear porch and dormer using exclusive Circo specifications. Triple ridging, hydro-seal valleys and flashings. Special ducco-coated zinc special nails.

"The undersigned agrees to accept said labor and materials and to pay therefor the sum of \$175 plus \$X charges in the following manner: \$75.00 on June 15th and the balance of \$100.00 to be represented by an installment note on the Contractor's form payable in 2 equal consecutive monthly installments of \$50.00, the first of said installments being payable 30 days after June 15th and 60 days after June 15th. Said note is delivered to the undersigned to secure the promises and covenants of the undersigned hereunder.

"This agreement shall become binding only upon the Contractor's written acceptance hereof or upon the Contractor's commencing performance and upon such acceptance or commencement of performance this shall constitute the entire contract and be binding upon the parties hereto, there being no covenants, promises or agreements, written or oral, except as herein set forth.

"On completion of said labor and materials, the undersigned shall forthwith sign and deliver to the contractor a completion certificate on the contractor's form. In the event

"Telephone: Victory 0600
"Date: May 17th - 41

"ADDRESS:

"The undersigned hereby requests the Contractors installing
and Roofing Company, hereinafter called the Contractor, to furnish
labor and materials necessary to install, construct, and place the
improvement herein described on/in the building known and commonly
designated as

"Address 624 E. Park Blvd.
"State Ill.

"According to the following specifications:

"Install exclusive Royal Red roof over entire roof area
including front and rear porch and dormer using exclusive Gisco
specifications. Triple ridding, Hydro-seal valleys and flashings.
Special gucc-coated zinc special nails.

"The undersigned agrees to accept said labor and materials

and to pay therefor the sum of \$175 plus 5% charges in the following
manner: \$75.00 on June 15th and the balance of \$100.00 to be

represented by an installment note on the Contractor's form

payable in 2 equal consecutive monthly installments of \$50.00,

the first of said installments being payable 30 days after June

15th and 60 days after June 15th. Said note is delivered to the

undersigned to secure the promises and covenants of the undersigned

hereunder.

"This agreement shall become binding only upon the

Contractor's written acceptance hereof or upon the Contractor's

commencing performance and upon such acceptance or commencement

of performance this shall constitute the entire contract and be

binding upon the parties hereto, there being no covenants, promises

or agreements, written or oral, except as herein set forth.

"On completion of said labor and materials, the under-

signed shall forthwith sign and deliver to the contractor a

completion certificate on the contractor's form. In the event

the undersigned fails so to do, the amounts due under this contract shall be and become immediately due and payable, without notice.

"The Contractor shall not be responsible for damage or delay due to strikes, ^{fires,} accidents or other causes beyond their reasonable control.

"The undersigned hereby authorizes the Contractor to make all such openings in the building as are necessary for the execution of this work and the Contractor agrees to close all such openings in a workmanlike manner. The Contractor shall not be liable for injury to ceilings or for cracks in the ceilings or plaster, unless the same is caused by the Contractor's negligence.

"Contractor shall not be liable for damage to furniture, fixtures, decorations, clothing or any other personal property in the premises, whether the damage is caused by leaks, openings or otherwise.

"In the event that the undersigned fails to pay, at the maturity thereof, any of the installments provided for hereunder, any guarantees that may have been made or given by the Contractor, in connection with said labor and materials, or otherwise, shall become null and void, without notice.

"Contractor shall provide and pay for workmen's compensation insurance covering all of its employees in connection with said improvement and shall provide and pay for sufficient public liability insurance to protect the undersigned in the event of injury to any person or persons in connection with the work done hereunder.

"Res. Phone 1568 R
"Res. Address 624 E. Park Blvd.

"D. I. Phillips (Seal)

"Mrs. D. I. Phillips (Seal)

"Consumers Insulating & Roofing Co.

....."Nelson.....(Seal)

"This Contract Not Subject To Cancellation"

(Italics ours.)

the undersigned fails so to do, the amount due under this contract shall be and become immediately due and payable, without notice.

"The Contractor shall not be responsible for delay or delay due to strikes, ^{fires,} accidents or other causes beyond their reasonable control.

"The undersigned hereby authorizes the Contractor to make all such openings in the building as are necessary for the execution of this work and the Contractor agrees to close all such openings in a workmanlike manner. The Contractor shall not be liable for injury to ceilings or for cracks in the ceilings or plaster, unless the same is caused by the Contractor's negligence.

"Contractor shall not be liable for damage to furniture, fixtures, decorations, clothing or any other personal property in the premises, whether the damage is caused by leaks, openings or otherwise.

"In the event that the undersigned fails to pay, at the maturity thereof, any of the installments provided for hereunder, any guarantees that may have been made or given by the Contractor, in connection with said labor and materials, or otherwise, shall become null and void, without notice.

"Contractor shall provide and pay for workmen's compensation insurance covering all of its employees in connection with said improvement and shall provide and pay for sufficient public liability insurance to protect the undersigned in the event of injury to any person or persons in connection with the work done hereunder.

"Res. Phone 1568 R
"Res. Address 624 E. Park Blvd.
"D. I. Phillips (Seal)

"Mrs. D. I. Phillips (Seal)
"Consumers Insulating & Roofing Co.
"Witness..... (Seal)

"This Contract Not Subject To Cancellation"

(Initials over.)

Defendant contends: "1. The court erred in failing to grant defendant's motion to vacate the judgment by confession. 2. The court erred in failing to open up the judgment and permitting defendant's petition to stand as an answer to plaintiffs' statement of claim. 3. The court erred when it did not find that defendant's petition showed a meritorious defense to the entry of the judgment by confession." We find it difficult to understand the ruling of the trial court in denying the defendant an opportunity to defend against the claim of plaintiff. From the nature of the brief filed by plaintiffs in this court we may conjecture that the trial court was swayed by highly technical points urged by plaintiffs' counsel in support of the judgment. In this court plaintiffs concede, as they must, that the promissory note and the written contract between the parties (Exhibit A) must be construed together as the agreement between them. The written contract states plainly that the note was given to secure the promises and covenants of defendant under the contract. The petition states that two days after the written agreement was signed the defendant learned of certain "false misrepresentations" made by plaintiffs' agent and for that reason he exercised his right of cancellation, and that on the same date he "called the offices of plaintiffs and advised them that he did not wish plaintiffs to proceed with the installation of said new roof." The petition alleges that "said material and labor for said new roof were never furnished nor performed." As we have heretofore stated, the note was given to secure the promises of defendant to pay for work and materials to be furnished by plaintiffs under the contract. The full amount that defendant agreed to pay for labor and materials to be furnished by plaintiffs was the sum of \$175, and the promissory note given is for that amount. If the instant judgment were allowed to stand defendant would be required to pay \$175 for work and materials none of which was furnished by plaintiffs and in addition to pay \$25 for attorney's fees. The fact that defendant gave the promissory note

Defendant contends: "1. The court erred in failing to grant defendant's motion to vacate the judgment by confession. 2. The court erred in failing to open up the judgment and permitting defendant's petition to stand as an answer to plaintiff's statement of claim. 3. The court erred when it did not find that defendant's petition showed a meritorious defense to the entry of the judgment by confession." We find it difficult to understand the ruling of the trial court in denying the defendant an opportunity to defend against the claim of plaintiff. From the nature of the brief filed by plaintiff in this court we may conjecture that the trial court was swayed by highly technical points urged by plaintiff's counsel in support of the judgment. In this court plaintiff concedes, as they must, that the promissory note and the written contract between the parties (Exhibit A) must be construed together as the agreement between them. The written contract states plainly that the note was given to secure the promise and covenants of defendant under the contract. The petition states that two days after the written agreement was signed the defendant learned of certain "false representations" made by plaintiff's agent and for that reason he exercised his right of cancellation and that on the same date he "called the offices of plaintiff and advised them that he did not wish plaintiff to proceed with the installation of said new roof." The petition alleges that "said material and labor for said new roof were never furnished nor performed." As we have heretofore stated, the note was given to secure the promises of defendant to pay for work and materials to be furnished by plaintiff under the contract. The full amount that defendant agreed to pay for labor and materials to be furnished by plaintiff was the sum of \$175, and the promissory note given for that amount. If the instant judgment were allowed to stand defendant would be required to pay \$175 for work and materials none of which was furnished by plaintiff and in addition to pay \$25 for attorney's fees. The fact that defendant gave the promissory note

as security would not give plaintiffs the right to take judgment by confession against defendant for the full amount of the note before the work was performed and the materials furnished by plaintiffs. If upon a hearing of this cause it appears that defendant has committed a breach of the contract and has prevented plaintiffs from performing their obligations under the contract, the damages of plaintiffs would be limited to the loss of profits sustained by them. We hold that the verified petition and Exhibit A made out a meritorious defense to the note upon which judgment was confessed, and that it would be against equity and justice to deny defendant his day in court.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded with directions to the trial court to open up the judgment by confession and give defendant a trial on the merits.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur.

as security would not give plaintiffs the right to take judgment by confession against defendant for the full amount of the note before the work was performed and the materials furnished by plaintiffs. If upon a hearing of this cause it appears that defendant has committed a breach of the contract and has prevented plaintiffs from performing their obligations under the contract, the damages of plaintiffs would be limited to the loss of profits sustained by them. We hold that the verified petition and Exhibit A made out a meritorious defense to the note upon which judgment was confessed, and that it would be against equity and justice to deny defendant his day in court.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded with directions to the trial court to open up the judgment by confession and give defendant a trial on the merits.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur.

42438

318 I.A. 642²

C. I. T. CORPORATION, a corporation,
Appellee, }

v. }

LEVY SMITH and JANIE L. SMITH,
Appellants. }

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff (appellee) sued Levy Smith and Janie L. Smith, defendants (appellants), on a promissory note for \$1,161.28. Upon motion of plaintiff the trial court entered a summary judgment against defendants for \$1,335.47. Defendants appeal.

Plaintiff's statement of claim alleges that it is the bona fide holder and owner of a promissory note dated December 20, 1941, executed and delivered by defendants to Jeffries Roofing Company, for the sum of \$1,161.28, payable in monthly installments of \$32.26, commencing February 1, 1942; that defendants have defaulted in their payments on the note and that by reason thereof all of the remaining installments have come due; that the note provides for fifteen per cent attorney's fees.

Defendants filed an appearance and a demand for a jury trial. Their verified affidavit of defense is as follows:

"Par. 1. Defendants say that plaintiff is not the bona fide owner and holder of the note.

"Par. 2. Defendants repudiate the note and liability thereon.

"Par. 3. Deny liability for attorney's fees, and interest and deny plaintiff is entitled to a judgment.

"Par. 4. Defendants say on or about December 5, 1941, Clarence Jeffries, trading as the Jeffries Roofing Company, obtained their signature to an application for a loan, that it was in blank and on the form of the C. I. T. Corporation, plaintiff. There was also attached to the application a certificate of completion and note, all on one page, with perforations so that

31 A. 643

C. I. T. CORPORATION, a corporation,
Appellee,

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

LEVY SMITH and JAMES L. SMITH,
Appellants.

MR. JUSTICE SEANAN DELIVERED THE OPINION OF THE COURT.

Plaintiff (appellee) sued Levy Smith and James L. Smith,

defendants (appellants), on a promissory note for \$1,161.28. Upon

motion of plaintiff the trial court entered a summary judgment

against defendants for \$1,335.47. Defendants appeal.

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bona fide holder and owner of a promissory note dated December 20,

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Company, for the sum of \$1,161.28, payable in monthly installments

of \$32.26, commencing February 1, 1942; that defendants have de-

faulted in their payments on the note and that by reason thereof

all of the remaining installments have come due; that the note

provides for fifteen per cent attorney's fees.

Defendants filed an appearance and a demand for a jury

trial. Their verified affidavit of defense is as follows:

"Par. 1. Defendants say that plaintiff is not the bona

fide owner and holder of the note.

"Par. 2. Defendants repudiate the note and liability

thereon.

"Par. 3. Deny liability for attorney's fees, and interest

and deny plaintiff is entitled to a judgment.

"Par. 4. Defendants say on or about December 5, 1941,

Clarence Jeffries, trading as the Jeffries Roofing Company, ob-

tained their signature to an application for a loan, that it was

in blank and on the form of the C. I. T. Corporation, plaintiff.

There was also attached to the application a certificate of

completion and note, all on one page, with perforations so that

they could be separated into three instruments. That defendants thought they were only signing an application for a loan and apparently they also signed the note and certificate of completion, though they do not remember so doing, having full confidence in the said Jeffries, they signed what they thought was an application for a loan only.

"Par. 5. That on or about said December 5, 1941, the defendants who own their home at 9432 Lafayette Avenue, Chicago, agreed with Jeffries in writing that he was to insulate the attic of the home and cut front and rear openings in the same and stairways, front and rear openings in the same and stairways front and rear, for \$475.00, on account of which the defendants paid Jeffries \$100.00. That Jeffries then told them they ought to build a kitchen and room for bath in the said attic in addition, and not having the cash Jeffries got them to sign the application for the loan and told them it was necessary to sign an application for more than \$1,000.00, that no lesser loans could be obtained thru F. H. A. this being an F. H. A. loan. That out of the proceeds of the loan he would build said kitchen and room for bath, that the cost of this kitchen and room for bath would be around \$300.00, and that he would refund any difference between the sum total of \$375.00 balance due on first job and \$300.00 approximate amount of second job and the amount of the loan. That Jeffries filled in the application, note and certificate, and dated them all December 20, 1941, that when they reached plaintiff all three instruments were dated December 20, 1941 and at least two of the instruments told what the money was being obtained for, that it was a remodeling job, that plaintiff knew or should have known when it got the note that the title of Jeffries to same was defective, because by no stretch of the imagination could such a remodeling job be commenced and completed the same day.

"Par. 6. Further, the consideration for said note has failed, Jeffries failed to complete the job and has refused to

they could be separated into three instruments. That defendant thought they were only signing an application for a loan and apparently they also signed the note and certificate of completion, though they do not remember so doing, having full confidence in the said Jeffries, they signed what they thought was an application for a loan only.

"Par. 5. That on or about said December 5, 1941, the defendants who own their home at 9432 Lafayette Avenue, Chicago, agreed with Jeffries in writing that he was to install the attic of the home and cut front and rear openings in the same and stairways, front and rear openings in the same and stairways front and rear, for \$475.00, on account of which the defendants paid Jeffries \$100.00. That Jeffries then told them they ought to build a kitchen and room for bath in the said attic in addition, and not having the cash Jeffries got them to sign the application for the loan and told them it was necessary to sign an application for more than \$1,000.00, that no lesser loan could be obtained from F. H. A., this being an F. H. A. loan. That out of the proceeds of the loan he would build said kitchen and room for bath, that the cost of this kitchen and room for bath would be around \$300.00, and that he would refund any difference between the said total of \$375.00 balance due on first job and \$300.00 approximate amount of second job and the amount of the loan. That Jeffries filled in the application, note and certificate, and dated them all December 20, 1941, that when they reached plaintiff all three instruments were dated December 20, 1941 and at least two of the instruments told what the money was being obtained for, that it was a remodeling job, that plaintiff knew or should have known when it got the note that the title of Jeffries to same was defective, because by no stretch of the imagination could such a remodeling job be commenced and completed the same day.

"Par. 6. Further, the consideration for said note has failed, Jeffries failed to complete the job and has refused to

complete it. Such work as has been done, has been done defectively and not in a workmanlike manner.

"Jeffries never obtained a building permit for the work, and the city has never inspected the job.

"The front stairway does not have proper guards and railings.

"The rear stairway does not have proper guards or railings, so that anyone slipping on the stairway, or on the landing, would be hurled 20 feet to the ground below.

"The job has not been painted.

"The floor of the rear room is not level and is out of line six inches.

"Rain leaks through the roof into the new room, and in other respects the job is unfinished and defective.

"Par. 7. Plaintiff has a guarantee on the back of the note that it will be paid, and did not rely upon defendants when the note was accepted.

"Par. 8. Plaintiff is not a bona fide holder of said note, the consideration has failed and judgment should be denied."

Subsequently the trial court ordered defendants to file an additional defense in five days, "setting up knowledge and admitting signing." Defendants then filed the following verified additional affidavit of defense:

"The defendant_ say that:

"1. They admit that they signed the note in question, but that the signatures were obtained in manner and form as set out in the original statement of defense.

"2. That before plaintiff paid out any money on the note in question to the said Clarence Jeffries on his account, it had knowledge of the defects in the title to said note on the part of said Clarence Jeffries, knew how he obtained said note, and the failure on the part of the said Clarence Jeffries

complete it. Such work as has been done, has been done defectively and not in a workmanlike manner.

"Jeffries never obtained a building permit for the work, and the city has never inspected the job.

"The front stairway does not have proper guards and railings.

"The rear stairway does not have proper guards or railings, so that anyone slipping on the stairway, or on the landing, would be hurled 20 feet to the ground below.

"The job has not been painted.

"The floor of the rear room is not level and is out of line six inches.

"Rain leaks through the roof into the new room, and in other respects the job is unfinished and defective.

"Par. 7. Plaintiff has a guarantee on the back of the note that it will be paid, and did not rely upon defendants when the note was accepted.

"Par. 8. Plaintiff is not a bona fide holder of said note, the consideration has failed and judgment should be denied."

Subsequently the trial court ordered defendants to file an additional defense in five days, "setting up knowledge and admitting signing." Defendants then filed the following verified additional affidavit of defense:

"The defendant say that:

"1. They admit that they signed the note in question, but that the signatures were obtained in manner and form as set out in the original statement of defense."

"2. That before plaintiff paid out any money on the note in question to the said Clarence Jeffries on his account, it had knowledge of the defects in the title to said note on the part of said Clarence Jeffries, knew how he obtained said note, and the failure on the part of the said Clarence Jeffries

to complete the work, and that such work as was done, was done in an unworkmanlike manner as described in said original statement of defense."

Plaintiffs then filed a motion for summary judgment and in support of the same filed the following verified affidavit:

"George A. Patterson * * * says that he was on December 21, 1941, and for some time prior thereto manager of the Auburn Park office of the C. I. T. Corporation * * *; that this affiant has full knowledge of the facts.

"Deponent further states that the defendants, Levy Smith and Jane Smith, made, executed and delivered their promissory note dated December 12, 1941, in the principal sum of One Thousand One Hundred Sixty-One and 28/100 Dollars, photostatic copy of which is hereto attached, marked Plaintiff's Exhibit '1' and hereby made a part thereof; that C. I. T. Corporation, the plaintiff herein, on the same date purchased said note from the payee, Jeffries Roofing Company, who endorsed without recourse, delivered it to the plaintiff together with completion certificate, copy of which is hereto attached, marked as Plaintiff Exhibit '2'; and received as consideration therefore the sum of One Thousand Ten and no/100 Dollars by bank check which was paid on December 24, 1941, through the Chicago Clearing House.

"Deponent further states that he approved the credit on this account on December 20, 1941, and authorized the issuance of said bank check, photostatic copy of which is hereto attached marked Plaintiff's Exhibit '3' and hereby made a part thereof, on that day; that this affiant did not nor did any other officer or agent of the plaintiff, C. I. T. Corporation, receive notice of alleged infirmities or defects before January 9, 1942, on which date Levy Smith, one of the defendants, called on the telephone and said that he was dissatisfied with the work performed by Jeffries Roofing Company and would not pay the note; that said Jeffries Roofing Company was notified of this complaint

to complete the work, and that such work as was done, was done in an unworkmanlike manner as described in said original statement of defense."

Plaintiffs then filed a motion for summary judgment and in support of the same filed the following verified affidavit: "George A. Patterson * * * says that he was on December 21, 1941, and for some time prior thereto manager of the Auburn Park office of the C. I. T. Corporation * * *; that this affiant has full knowledge of the facts.

"Deponent further states that the defendants, Levy Smith and Jane Smith, made, executed and delivered their promissory note dated December 12, 1941, in the principal sum of One Thousand One Hundred Sixty-One and 28/100 Dollars, photostatic copy of which is hereto attached, marked Plaintiff's Exhibit '1', and hereby made a part thereof; that C. I. T. Corporation, the plaintiff herein, on the same date purchased said note from the payee, Jetties Roofing Company, who endorsed without recourse, delivered it to the plaintiff together with completion certificate, copy of which is hereto attached, marked as Plaintiff Exhibit '2'; and received as consideration therefore the sum of One Thousand Ten and no/100 Dollars by bank check which was paid on December 24, 1941, through the Chicago Clearing House.

"Deponent further states that he approved the credit on this account on December 20, 1941, and authorized the issuance of said bank check, photostatic copy of which is hereto attached, marked Plaintiff's Exhibit '3' and hereby made a part thereof, on that day; that this affiant did not nor did any other officer or agent of the plaintiff, C. I. T. Corporation, receive notice of alleged infirmities or defects before January 9, 1942, on which date Levy Smith, one of the defendants, called on the telephone and said that he was dissatisfied with the work performed by Jetties Roofing Company and would not pay the note; that said Jetties Roofing Company was notified of this complaint

and submitted his affidavits of facts, photostatic copies of which are hereto attached marked Plaintiff's Exhibit '4A' and '4B' and hereby made a part hereof.

"This affiant further states the facts to be that no payments have been made on Plaintiff's Exhibit '1', and that there is now due and owing thereon from the defendants to the plaintiff the sum of One Thousand Three Hundred Thirty-Five and 47/100 Dollars, which amount includes the sum of One Hundred Seventy-Four and 19/100 Dollars for plaintiff's attorney's fees as provided in plaintiff Exhibit '1'.

"Deponent further says that Plaintiff's Exhibit '1' to '4B' both inclusive, are photostatic copies of the originals; that he has compared the photostatic copies with the originals and found them to be true and correct copies thereof."

Attached to the affidavit is the following document:

"For use in all States

"\$1161.28 Chicago Illinois Dec. 20, 1941
(Total Amount of Note) (City) (State) (Date)

"AFTER DATE, I, WE, OR EITHER OF US, PROMISE TO PAY TO _____

Jeffries Roofing Co OR ORDER THE SUM OF _____
(Seller)
Eleven Hundred Sixty-One and 28/100 DOLLARS IN _____

SUCCESSIVE MONTHLY INSTALMENTS each of \$ 32.26, except final instalment which shall be the balance then due on this note, COMMENCING ON THE 1st DAY OF Feb 1942, AND ON THE SAME DATE OF EACH MONTH THEREAFTER UNTIL PAID, with interest on principal, after maturing of entire balance as herein provided, at the highest lawful contract rate, and 15% of the principal and interest of this note, or at the option of the holder a reasonable sum, as attorney's fees, if placed in the hands of an attorney for collection after maturity. On non-payment of any instalment at its maturity, all remaining instalments shall become due and payable forthwith. Authorized F H A 'late charges' (5¢ per \$1, maximum \$5) are payable on any instalment more than 15 days in arrears. All

and admitted his affidavit of facts, photostatic copies of which are hereto attached marked Plaintiff's Exhibit '4' and '4B' and hereby made a part hereof.

"This affiant further states the facts to be that no payments have been made on Plaintiff's Exhibit '1', and that there is now due and owing thereon from the defendants to the plaintiff the sum of One Thousand Three Hundred Thirty-Five and 47/100 Dollars, which amount includes the sum of One Hundred Seventy-Four and 19/100 Dollars for plaintiff's attorney's fees as provided in Plaintiff's Exhibit '1'.

"Deponent further says that Plaintiff's Exhibit '1' to '4B' both inclusive, are photostatic copies of the originals; that he has compared the photostatic copies with the originals and found them to be true and correct copies thereof."

Attached to the affidavit is the following document:

"For use in all States

"\$1101.28 Chicago Illinois
(Total Amount of Note) (City) (State)
Dec. 20, 1941
(Date)

"AFTER DATE, I, WE, OR EITHER OF US, PROMISE TO PAY TO
Jetties Pooling Co
(Seller)
Eleven Hundred Sixty-One and 28/100 DOLLARS IN

SUCCESSIVE MONTHLY INSTALLMENTS each of \$32.26, except
final installment which shall be the balance then due on this note,
COMMENCING ON THE 1st DAY OF Feb 1942, AND
ON THE SAME DATE OF EACH MONTH THEREAFTER UNTIL PAID, with interest
on principal, after maturity of entire balance as herein provided,
at the highest lawful contract rate, and 1/2% of the principal and
interest of this note, or at the option of the holder a reasonable
sum, as attorney's fees, if placed in the hands of an attorney for
collection after maturity. On non-payment of any installment at
its maturity, all remaining installments shall become due and payable
forthwith. Authorized F H A 'I' te charges' (\$4 per \$1, maximum \$5)
are payable on any installment more than 15 days in arrears. All

exemptions and homestead laws and all rights thereunder are hereby waived. Value received. Protest waived.

"NEGOTIABLE AND PAYABLE AT THE OFFICE OF " Levy Smith ²⁸¹⁰ (Seal)
C. I. T. CORPORATION, NEW YORK, CHICAGO,
OR SAN FRANCISCO WITH EXCHANGE. " Janie L. Smith (Seal)

"COMPLETION NOTICE TO BORROWER -- DO NOT SIGN THIS CERTIFICATE
CERTIFICATE UNTIL THE WORK IS SATISFACTORILY COMPLETED.

"I (we), the undersigned, hereby certify that all articles and materials have been furnished and installed and the work satisfactorily completed in accordance with my application for a loan on the premises as indicated below and pursuant to the provisions of Title I of the National Housing Act as amended.

"The undersigned hereby authorizes detachment of my (our) note and, if said note is undated, hereby authorizes C. I. T. Corporation to insert the date hereof or any later date as the date of said note.

" (Signature of
Owner or Lessee) Janie L. Smith

" Dec. 20, 1941 9432 Lafayette
(Date) (Address of Property Improved)"

The note part of the above is marked, "Pltff Ex 1" and the certificate part attached to the note is marked, "Plff Ex 2". On the back of the note part of the above appears the following:

"WITHOUT RECOURSE

Jeffries Roofing Co.
By C F Jeffries
Title Owner

WITHOUT RECOURSE

pay to the order of
C. I. T. Corporation

On the back of the certificate part of the above appears the following:

waived. Value received. Protest waived. Exemptions and Homestead laws and all rights thereunder are hereby

"NEGOTIABLE AND PAYABLE AT THE ORDER OF
C. I. T. CORPORATION, NEW YORK, CHICAGO,
OR SAN FRANCISCO WITH INTEREST."
"Lennie L. Smith (Seal)"
"Lenny Smith (Seal)"

"CERTIFICATE OF COMPLETION
NOTICE TO BORROWER -- DO NOT SIGN THIS CERTIFICATE
UNTIL THE WORK IS SATISFACTORILY COMPLETED."

"I (we), the undersigned, hereby certify that all articles and materials have been furnished and installed and the work satisfactorily completed in accordance with my application for a loan on the premises as indicated below and pursuant to the provisions of Title I of the National Housing Act as amended."

"The undersigned hereby authorizes detachment of my (our) note and, if said note is undated, hereby authorizes C. I. T. Corporation to insert the date hereof or any later date as the date of said note."

"Signature of
Owner or Lessee) Lennie L. Smith
9432 Lafayette
Dec. 20, 1941
(Date) (Address of Property Improved)"

The note part of the above is marked, "Title Ex 1" and the certificate part attached to the note is marked, "Title Ex 2". On the back of the note part of the above appears the following:

"WITHOUT RECOURSE"

Jetties Roofing Co.
By C. H. Jetties
Title Owner

WITHOUT RECOURSE

pay to the order of
C. I. T. Corporation

On the back of the certificate part of the above appears the following:

" Dec. 20, 1941
(Date)

"TO: C. I. T. CORPORATION;

"In consideration of your purchasing the note given by the debtor(s) whose signature(s) appears on the Completion Certificate on the reverse hereof for the work therein referred to, we (I) hereby certify that all articles and materials contracted for have been furnished and installed and the work fully completed, that the signature(s) on the note and on the Completion Certificate are genuine, that the Completion Certificate was signed after the articles and materials contracted for had been furnished and installed and the work fully completed. You or any of your officers are authorized to indorse said note in my (our) name without recourse if I (we) omit to do so.

" Dealer/Contractor/Applicator) _____:
must sign here

"(Signature) Jeffries Roofing Co
(Name)
By C F Jeffries Owner
(Title)"

(Any wording above lines in the foregoing document is written in pencil.)

Also attached to the affidavit is a check of plaintiff company, dated 12-20-41, payable to Jeffries Roofing Company, in the amount of \$1,010. The check is indorsed on the back, "Jeffries Roofing Co. C.F Jeffries Owner," and also contains a second indorsement by the First Trust & Savings Bank of Riverdale, Chicago, Illinois, to the City National Bank and Trust Company of Chicago, marked, "For Collection." The back of the check also contains an indorsement of the City National Bank and Trust Company; also a Clearing House certificate showing that the check went through the Chicago Clearing House on December 24, 1941. The cancellation stamp through the face of the check shows that it was paid through the Mutual National Bank, December 26, 1941.

In support of the motion plaintiff also filed an affidavit of

Dec. 24, 1941
(Date)

"T.C. I. T. CORPORATION"

"In consideration of your purchasing the note given by the debtor(s) whose signature(s) appears on the Completion Certificate on the reverse hereof for the work therein referred to, we (I) hereby certify that all articles and materials contracted for have been furnished and installed and the work fully completed, that the signature(s) on the note and on the Completion Certificate are genuine, that the Completion Certificate was signed after the articles and materials contracted for had been furnished and installed and the work fully completed. You or any of your officers are authorized to indorse said note in my (our) name without recourse if I (we) omit to do so."

"Dealer/Contractor/Applicator"
Must sign here

(Signature)
Jeffries Roofing Co.
(Name)
G. F. Jeffries Owner
"Little"

(Any wording above lines in the foregoing document is written in pencil.)

Also attached to the affidavit is a check of plaintiff company dated 12-20-41, payable to Jeffries Roofing Company, in the amount of \$1,010. The check is indorsed on the back, "Jeffries Roofing Co. G. F. Jeffries Owner," and also contains a second indorsement by the First Trust & Savings Bank of Riverdale, Chicago, Illinois, to the City National Bank and Trust Company of Chicago, marked, "For Collection." The back of the check also contains an indorsement of the City National Bank and Trust Company; also a Clearing House certificate showing that the check went through the Chicago Clearing House on December 24, 1941. The cancellation stamp through the face of the check shows that it was paid through the Mutual National Bank, December 26, 1941. In support of the motion plaintiff also filed an affidavit of

Clarence F. Jeffries, which reads as follows:

"* * *

"He is the contractor who undertook to perform and did perform certain repairs about and upon the premises at 9432 Lafayette Avenue, Chicago, Illinois. These repairs included several items, such as insulation of the front and rear cottages upon the property at this address, erection of a small upstairs room and bath, lining ceiling with roofing paper, applying roofing paper to floor, completion of front and rear entrance to the attic. On or about the 5th day of Dec., 1941, a contract for this work was signed by the owners of this said property, one Levy Smith and one Janey Smith, husband and wife. A note for the amount of the work contracted for was also signed by these said parties, and a completion ticket was signed, in the presence of this affiant, by Janey Smith, one of said owners, while the usual form F.H.A application and complete contract was signed by said parties on or about the 20 day of Dec., 1941; at the time this F.H.A. application and complete contract was signed, this affiant explained what the monthly payments were to be, and that the contract would be sold to the C.I.T Corporation, to which they agreed. The papers were actually sent to the C.I.T. Corporation the following day, and said contract was accepted by them apparently some days later. This affiant was paid by C.I.T. Corporation the amount agreed upon.

"Neither of the owners of this said property at any time complained about the work or about the manner in which it was performed; however, Levy Smith did request this affiant to perform certain additional work from time to time, which this affiant did do; Levy Smith occasionally praised this affiant for the quality of the work done.

"Affiant further states that all of the work contracted to be done upon these said premises were done in a good, workmanlike manner, and that competent help was employed in and about the job;

Clarence F. Jeffries, which reads as follows:

"* * *

"He is the contractor who undertook to perform and did

perform certain repairs about and upon the premises at 9432

Lafayette Avenue, Chicago, Illinois. These repairs included

several items, such as insulation of the front and rear cottages

upon the property at this address, erection of a small upstairs

room and bath, lining ceiling with roofing paper, applying roofing

paper to floor, completion of front and rear entrance to the attic,

On or about the 5th day of Dec., 1941, a contract for this work was

signed by the owners of this said property, one Levy Smith and one

Janey Smith, husband and wife. A note for the amount of the work

contracted for was also signed by these said parties, and a completion

ticket was signed, in the presence of this affiant, by Janey Smith,

one of said owners, while the usual form F.H.A. application and

complete contract was signed by said parties on or about the 20

day of Dec., 1941; at the time this F.H.A. application and complete

contract was signed, this affiant explained what the monthly payments

were to be, and that the contract would be sold to the G.I.T. Cor-

poration, to which they agreed. The papers were actually sent to

the G.I.T. Corporation the following day, and said contract was

accepted by them apparently some days later. This affiant was paid

by G.I.T. Corporation the amount agreed upon.

"Neither of the owners of this said property at any time

complained about the work or about the manner in which it was per-

formed; however, Levy Smith did request this affiant to perform

certain additional work from time to time, which this affiant did

do; Levy Smith occasionally praised this affiant for the quality

of the work done.

"Affiant further states that all of the work contracted to

be done upon these said premises were done in a good, workmanlike

manner, and that competent help was employed in and about the job;

that all of the work contracted to be done upon these premises has been done.

"Finally, affiant states that he knows of no reason why the owners of said property should complain or refuse to make payment upon their just contract."

Plaintiff also introduced a second affidavit by Clarence F. Jeffries "that a completion ticket in the usual form was signed voluntarily by said Janey Smith, the recorded owner of record of said premises, and that he saw said Janey Smith sign said completion ticket."

Defendants filed two counteraffidavits in opposition to the motion for summary judgment. One, made by Levy Smith, defendant, is as follows:

"(1) Levy Smith * * * says that he is one of the defendants in the above entitled cause, and that he makes this affidavit in reply to the affidavits filed by the plaintiff in this cause for a summary judgment, that he has full and personal knowledge of the facts.

"(2) Affiant states in reply to the affidavit of George A. Patterson that there was no note dated December 12, 1941 that plaintiff's Exhibit I is dated December 20, 1941, and not December 12, 1941.

"(3) Affiant states further that there were three instruments dated December 20, 1941, the note, Plaintiff's Exhibit I, the application for the loan attached hereto, as defendant's Exhibit I and the completion certificate, Plaintiff's Exhibit 2.

"(4) That these instruments were apparently all written at one time, were on one sheet, which have perforations, so that the three exhibits could be separated, and these forms are printed up and used by the C. I. T. Corporation, the plaintiff in the course of its business.

"(5) That defendants are husband and wife, and they signed the application for the loan and apparently they also signed the

that all of the work contracted to be done upon these premises has been done.

"Finally, affiant states that he knows of no reason why the owners of said property should complain or refuse to make payment upon their last contract."

Plaintiff also introduced a second affidavit by Clarence E. Jeffries "that a completion ticket in the usual form was signed voluntarily by said Janey Smith, the recorded owner of record of said premises, and that he saw said Janey Smith sign said completion ticket."

Defendants filed two counteraffidavits in opposition to the motion for summary judgment. One, made by Levy Smith, defendant, is as follows:

"(1) Levy Smith * * * says that he is one of the defendants in the above entitled cause, and that he makes this affidavit in reply to the affidavits filed by the plaintiff in this cause for a summary judgment, that he has full and personal knowledge of the facts. (2) Affiant states in reply to the affidavit of George A. Patterson that there was no note dated December 12, 1941 that plaintiff's Exhibit I is dated December 20, 1941, and not December 12, 1941.

"(3) Affiant states further that there were three instruments dated December 20, 1941, the note, Plaintiff's Exhibit I, the application for the loan attached hereto, as defendant's Exhibit I and the completion certificate, Plaintiff's Exhibit 2.

"(4) That these instruments were apparently all written at one time, were on one sheet, which have perforations, so that the three exhibits could be separated, and these forms are printed up and used by the C. I. T. Corporation, the plaintiff in the course of its business.

"(5) That defendants are husband and wife, and they signed the application for the loan and apparently they also signed the

note, though at first they did not remember signing the note, that as set out in the affidavit of defense, they thought they were only signing an application for a loan, that affiant did not sign the Certificate of Completion, that all three forms were signed at the one time both husband and wife being together at the time and that the signature to the Completion Certificate was obtained by some trick or device from Jane Smith that affiant is positive it was not signed in his presence, that the work was not completed on December 20, 1941, nor has it since been completed.

"(6) That on December 6, 1941 a contract was drawn between affiant and C. F. Jeffries, the contractor, for a part of the work in question and a copy of said contract is herewith attached as defendant's Exhibit II, and is for the sum of \$475.00 against which \$100.00 was paid.

"(7) That Jeffries then told affiant and wife that they ought to build a kitchen and room for bath in the attic of their home in addition to the work set forth in defendant's Exhibit II, and not having the ready cash available, Jeffries then got them to sign the application for a loan, and told them it was necessary to make the application for a sum not less than \$1000.00, told them that no lesser loan could be obtained through the F. H. A. and this was an F. H. A. loan, and that out of the proceeds he would build said kitchen in the rear of attic with the place for bath attached, complete, painting and all, that while he did not know exactly how much the work would run he believed that this would cost somewhere about \$300.00 and that he would refund the difference to them between the \$375.00 on the first job and the \$300.00 for the second job, and the amount of the loan. That when the papers reached plaintiff defendant's Exhibit II was among the papers delivered to it by Jeffries but there was no written contract for the additional work ever signed or delivered to the said Jeffries or by him to the said plaintiff, and this should have put plaintiff on inquiry for the loan was for \$1000.00 and not \$375.00 the balance due on defendant's

notes, though at first they did not remember signing the notes, that as set out in the affidavit of defense, they thought they were only signing an application for a loan, that affiant did not sign the Certificate of Completion, that all three forms were signed at the one time both husband and wife being together at the time and that the signature to the Completion Certificate was obtained by some trick or device from Jane Smith that affiant is positive it was not signed in his presence, that the work was not completed on December 30, 1941, nor has it since been completed.

"(6) That on December 6, 1941 a contract was drawn between affiant and C. F. Jeffries, the contractor, for a part of the work in question and a copy of said contract is herewith attached as defendant's Exhibit II, and is for the sum of \$475.00 against which \$100.00 was paid.

"(7) That Jeffries then told affiant and wife that they ought to build a kitchen and room for bath in the attic of their home in addition to the work set forth in defendant's Exhibit II, and not having the ready cash available, Jeffries then got them to sign the application for a loan, and told them it was necessary to make the application for a sum not less than \$1000.00, told them that no lesser loan could be obtained through the F. H. A. and this was an F. H. A. loan, and that out of the proceeds he would build said kitchen in the rear of attic with the place for bath attached, complete, painting and all, that while he did not know exactly how much the work would run he believed that this would cost somewhere about \$300.00 and that he would refund the difference to them between the \$375.00 on the first job and the \$300.00 for the second job, and the amount of the loan. That when the papers reached plaintiff defendant's Exhibit II was among the papers delivered to it by Jeffries but there was no written contract for the additional work ever signed or delivered to the said Jeffries or by him to the said plaintiff, and this should have put plaintiff on inquiry for the loan was for \$1000.00 and not \$375.00 the balance due on defendant's

Exhibit II.

"(8) Affiant states further that when Jeffries obtained their signatures to the papers in question they were in blank, and they had confidence in Jeffries and signed them believing them to be merely an application for a loan. That Jeffries filled in said application, note and Certificate of Completion. That when the papers reached the plaintiff, they were all dated December 20, 1941, though they were signed somewhere between the 5th and the 20th of December.

"(9) Affiant states further that the application, defendant's Exhibit I shows that the work was a remodeling job and that plaintiff knew or should have known in the exercise of good faith and reasonable care that a remodeling job for a price of \$1000.00 could not be commenced and completed in one day.

"(10) Affiant states further that before plaintiff paid out its money to Jeffries he called the plaintiff and told Patterson and one Richard Klein representatives of the plaintiff on the 22nd day of December, 1941, that the work contracted for by Jeffries was not completed, and not performed in a workmanlike manner as agreed and further told them he did not know how much the job would actually cost him, that plaintiff's check was not cashed until the 24th day of December, 1941, and did not reach Jeffries until the 23rd of December, 1941, that these three papers, the note, the application and Completion Certificate were all signed at one time according to a statement made by Jeffries, and were signed in fact some time before the 20th of December, 1941, that the consideration for the note was the proper doing of the work set out in Defendant's Exhibit I and in this affidavit.

"(11) Jeffries did not obtain a building permit from the City to prevent city supervision. Further: the work is defective in the following respects

"(a) The front stairway did not have proper guards and railings.

Exhibit II.

"(8) Allant states further that when Jeffries obtained their signatures to the papers in question they were in blank, and they had confidence in Jeffries and signed them believing them to be merely an application for a loan. That Jeffries filled in said application, note and Certificate of Completion. That when the papers reached the plaintiff, they were all dated December 30, 1941, though they were signed somewhere between the 25th and the 30th of December.

"(9) Allant states further that the application, defendant's Exhibit I shows that the work was a remodeling job and that plaintiff knew or should have known in the exercise of good faith and reasonable care that a remodeling job for a price of \$1000.00 could not be commenced and completed in one day.

"(10) Allant states further that before plaintiff paid out its money to Jeffries he called the plaintiff and told Patterson and one Richard Klein representatives of the plaintiff on the 22nd day of December, 1941, that the work contracted for by Jeffries was not completed, and not performed in a workmanlike manner as agreed and further told them he did not know how much the job would actually cost him, that plaintiff's check was not cashed until the 14th day of December, 1941, and did not reach Jeffries until the 23rd of December, 1941, that these three papers, the note, the application and Completion Certificate were all signed at one time according to a statement made by Jeffries, and were signed in fact some time before the 30th of December, 1941, that the consideration for the note was the proper doing of the work set out in Defendant's

Exhibit I and in this affidavit.

"(11) Jeffries did not obtain a building permit from the City to prevent city inspection. Further: the work is defective

in the following respects

"(a) The front stairway did not have proper guards and

"(b) The rear stairway did not have proper guards or railings so that any one slipping on the stairway or on the landing would be hurled to the ground below, some twenty feet.

"(c) None of the job has been painted.

"(d) The floor of the rear room is not level so that furniture put on the floor slides around, and the floor is out of line six inches, no proper support has been made for the room, so that the structure erected is not safe.

"(e) No provision has been made to keep the rain from leaking through the roof in to the new room, and the roof over the new room is built so that it does not properly carry off rain water, and in other respects the work is not finished and is unworkmanlike.

"(12) Affiant states the agents of the C. I. T. Corporation knew of the alleged defects on or before the 22nd of December, 1941, before the check was turned over to Jeffries and that it is not true that they did not know until January 9, 1942.

"(13) Further the affidavit of Jeffries that the work was completed is untrue because the work was not completed at the time of the commencement of the suit and is not completed now, and though Jeffries since the suit was filed has made several trips to complete the work it is not yet completed.

"(14) That the only written contract signed between Jeffries and affiant was for \$475.00 and none for a \$1000.00. That the work was not completed and that he did not praise Jeffries for the work.

"(15) That plaintiff should have known from the papers themselves that the work was not completed on December 20, 1941, nor could it be.

"(16) That affiant never saw Jeffries again after he got his money from the C. I. T. Corporation until suit was filed.

"Affiant states that before the plaintiff paid out its money to Jeffries it had actual knowledge of the defense of these defendants, and also was in possession of facts which made it bad

"(b) The rear stairway did not have proper guards or railings so that any one slipping on the stairway or on the landing would be hurled to the ground below, some twenty feet.

"(c) None of the job has been painted.

"(d) The floor of the rear room is not level so that furniture put on the floor slides around, and the floor is out of line six inches, no proper support has been made for the room, so that the structure erected is not safe.

"(e) No provision has been made to keep the rain from leaking through the roof in to the new room, and the roof over the new room is built so that it does not properly carry off rain water, and in other respects the work is not finished and is unworkmanlike. "12) Affiant states the agents of the G. I. T. Corporation knew of the alleged defects on or before the 22nd of December, 1941, before the check was turned over to Jeffries and that it is not true that they did not know until January 9, 1942.

"13) Further the affidavit of Jeffries that the work was completed is untrue because the work was not completed at the time of the commencement of the suit and is not completed now, and though Jeffries since the suit was filed has made several trips to complete the work it is not yet completed.

"14) That the only written contract signed between Jeffries and affiant was for \$475.00 and none for a \$1000.00. That the work was not completed and that he did not praise Jeffries for the work.

"15) That plaintiff should have known from the papers themselves that the work was not completed on December 20, 1941, nor could it be.

"16) That affiant never saw Jeffries again after he got his money from the G. I. T. Corporation until suit was filed. "Affiant states that before the plaintiff paid out its money to Jeffries it had actual knowledge of the delinquency of these defendants, and also was in possession of facts which made it bad

faith for it to take the paper as set out herein. It paid out before waivers of lien for labor & material were or could be obtained.

"Wherefore defendant denies that plaintiff is entitled to a summary judgment."

Defendants' Exhibit 1, attached to the foregoing affidavit, is a photostatic copy of the application for the loan. Therein the purported applicants, Levy Smith and Janie L. Smith, of 9432 Lafayette avenue, Chicago, state that the improvements are to be made on their house at the above address and are to cost \$1,010. The applicants certify that the entire proceeds of the loan will be expended on the property. The application purports to be signed by Levy Smith and Janie L. Smith, but it is evident from signatures of the defendants in the record that are conceded to be genuine that they did not sign the application. It is also evident that one person signed both names. Also attached to the affidavit is defendants' Exhibit 2, which is the contract between Levy Smith and the Jeffries Roofing Company, which is as follows:

"Date Dec. 5, 1941

"To Levy Smith
(Purchaser)
9432 Lafayette
(No and Street)

" Jeffrie Roofing hereinafter called the Contractor proposes to furnish all material and labor necessary to install, construct, and place the improvements described herein on/in building located at No _____ Street _____ City _____ State _____

"We will insulate this building and rear room also building in rear with six inches of union rods wall also reline entire attic and floor also to construct front and rear entrance to attic including two doors furnish all insurance necessary for job. price of job \$475.00

"For the sum of down payment \$100.00 bal. \$375.00.

faith for it to take the paper as set out herein. It laid out before viewers of lien for labor & material were or could be obtained.

"wherefore defendant denies that plaintiff is entitled to a summary judgment."

Defendants, Exhibit 1, attached to the foregoing affidavit, is a photostatic copy of the application for the loan. Therein the purported applicants, Levy Smith and Jamie L. Smith, of 9432 Lafayette Avenue, Chicago, state that the improvements are to be made on their house at the above address and are to cost \$1,010. The applicants certify that the entire proceeds of the loan will be expended on the property. The application purports to be signed by Levy Smith and Jamie L. Smith, but it is evident from signatures of the defendants in the record that are conceded to be genuine that they did not sign the application. It is also evident that one person signed both names. Also attached to the affidavit is defendants, Exhibit 2, which is the contract between Levy Smith and the Jeffries Roofing Company, which is as follows:

"Date Dec. 7, 1941

"To Levy Smith
(Purchaser)
9432 Lafayette
(No and Street)

"Jeffries Roofing hereinafter called the Contractor proposes to furnish all material and labor necessary to install, construct, and place the improvements described herein on/in building located at No _____ Street _____ City _____ State _____

"We will install this building and rear room also building in rear with six inches of union rods will also replace entire attic and floor also to construct front and rear entrance to attic including two doors furnish all insurance necessary for job. Price of

Job \$475.00

"For the sum of down payment \$100.00 bal. \$375.00.

"To be represented by an installment note on the contractor's form payable in _____ equal monthly installments, which the acceptor or acceptors hereof agree(s) to execute promptly upon completion of the work and the fulfillment of all specifications contained herein.

"This agreement shall become binding only upon the contractor's commencing performance and upon such acceptance or commencement of performance this shall constitute the entire contract and be binding upon the parties hereto, there being no covenants, promises or agreements, written or oral, except as herein set forth.

"It is further understood that:

"(A) The contractor shall not be responsible for damage or delay due to strikes, fire accidents or other causes beyond his reasonable control.

"(B) The proposal is limited to _____ days acceptance from date hereof.

"(C) The Purchaser is dealing with the Contractor as principal and that the Contractor is not acting hereunder as the agent or representative of any firm person or corporation.

"ACCEPTED (date) _____

" _____ L.S

" Levy Smith L S

"Jeffries Roofing Co
(Contractor)

"
(Representative)"

Defendants also introduced the affidavit of Jane L. Smith, defendant, which reads as follows:

"(1) Jane L. Smith * * * says that all the papers in question, the note, the Certificate of Completion and the application for the loan were signed all at one time, sometime between the 5th day of December, 1941 and the 20th day of December, 1941.

"(2) That the Certificate of Completion was signed by her through some trick or device on the part of Jeffries. That she does not remember signing it. That the work was not completed on December 20, 1941, and it would therefore have been impossible for her to say

"To be represented by an installment note on the contractor's form payable in _____ equal monthly installments, which the acceptor or acceptors hereof agree(s) to execute promptly upon completion of the work and the fulfillment of all specifications contained herein.

"This agreement shall become binding only upon the contractor's commencing performance and upon such acceptance or commencement of performance this shall constitute the entire contract and be binding upon the parties hereto, there being no covenants, promises or agreements, written or oral, except as herein set forth.

"It is further understood that:

"(A) The contractor shall not be responsible for damage or delay due to strikes, fire accidents or other causes beyond his reasonable control.

"(B) The proposal is limited to _____ days acceptance from date hereof.

"(C) The Purchaser is dealing with the Contractor as principal and that the Contractor is not acting hereunder as the agent or representative of any firm person or corporation.

_____	"ACCEPTED (date)
_____ L.S.	"
_____ Levy Smith	"
_____ L.S.	"
_____ (Representative)"	"
_____ "Jeffries Roofing Co (Contractor)"	"

Defendants also introduced the affidavit of Jane L. Smith,

defendant, which reads as follows:

"(1) Jane L. Smith * * * says that all the papers in question, the note, the Certificate of Completion and the application for the loan were signed all at one time, sometime between the 5th day of December, 1941 and the 20th day of December, 1941.

"(2) That the Certificate of Completion was signed by her through some trick or device on the part of Jeffries. That she does not remember signing it. That the work was not completed on December 20, 1941, and it would therefore have been impossible for her to say

that the work was completed on December 20, 1941.

"(3) That the work has not been completed up to this day. That there still remains painting to do, the floor is not level in the kitchen, water does not run off properly from the roof, and Jeffries has made two efforts since the suit was started and has not yet completed the work.

"(4) That she did not voluntarily sign the Completion Certificate.

"(5) That the work was not completed on December 20, 1941 and is not complete now.

"(6) That Jeffries' affidavit to the effect that the work is finished is not true and his statement that she voluntarily signed the Certificate of Completion is not true.

"(7) That without repeating the facts set forth in Levy Smith's affidavit, the said affidavit of Levy Smith is true, the three papers were all signed at one time, and the work has not been completed.

"(8) The C. I. T. Corporation was immediately notified and had a man view the condition of the work, and saw that the work was not completed.

"(9) That she has knowledge of the facts set forth here, personally.

" Jane Smith"

Defendants contend that a summary judgment should not be entered where the pleadings and the affidavits raise a triable issue of fact. This contention is, of course, a meritorious one.

Plaintiff's affidavit for summary judgment is to be strictly construed and the right to judgment must be free from doubt. Summary judgments should not be entered where the trial judge would have to decide controverted questions of fact. If the defense is "arguable," "apparent," or "made in good faith" it should be submitted to a jury. (See Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523; Barrett v. Shanks, 300 Ill. App. 119, 126; Gliwa v. Washington Polish Loan &

that the work was completed on December 20, 1941.

"(3) That the work has not been completed up to this day.

That there still remains painting to do, the floor is not level in the kitchen, water does not run off properly from the roof, and Jeffries has made two efforts since the suit was started and has not yet completed the work.

"(4) That she did not voluntarily sign the Completion

Certificate.

"(5) That the work was not completed on December 20, 1941

and is not complete now.

"(6) That Jeffries' affidavit to the effect that the work

is finished is not true and his statement that she voluntarily signed the Certificate of Completion is not true.

"(7) That without repeating the facts set forth in Levy

Smith's affidavit, the said affidavit of Levy Smith is true, the three papers were all signed at one time, and the work has not been completed.

"(8) The C. I. T. Corporation was immediately notified and had a man view the condition of the work, and saw that the work was not completed.

"(9) That she has knowledge of the facts set forth here,

personally.

" Jane Smith"

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entered where the pleadings and the affidavits raise a triable issue of fact. This contention is, of course, a meritorious one.

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(See Diversey Liquidating Corp. v. Newark, 370 Ill. 523; Barnett

v. Sparks, 300 Ill. App. 119, 126; Oliva v. Washington Polish Loan &

Bldg. Ass'n, 310 Ill. App. 465, 470.) To quote from the last mentioned case (pp. 470, 471):

"Defendant points out the rules which guide the courts. The procedure may not be used to impair right of trial by jury. Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523. The purpose of the procedure is not to try an issue of fact as that term is used in law but rather to try whether there is an issue of fact between the parties within the legal meaning. The method is necessarily inquisitorial. The pleadings (important) are not controlling. If it appears from facts stated in affidavits or documents that the answer pleaded is sham or false or frivolous it will be disregarded. If there is a material issue of fact it must be submitted to a jury. In Berick v. Curran, 55 R. I. 193, 179 Atl. 708, 710, this procedure is well described as 'a two-edged weapon -- useful if it precludes the interposition of defenses for delay, but dangerous if it deprives a defendant of the opportunity to have a trial of seriously contested questions of fact or law.'

"The authorities say affidavits for plaintiff should be construed strictly, those for defendants liberally. Shientag, 4 Fordham L. R. 186; Gleason v. Hoeke, 5 App. Dist. of Col. 1, 4-5; Fidelity & Deposit Co. v. United States for use of Smoot, 187 U. S. 315, 320; Wells v. Alropa Construction Corp., 82 Fed. (2d) 887, 889, are cited.

"Plaintiff's right to judgment should be free from doubt. Lord Esher in Sheppards & Co. v. Wilkinson & Jarvis, 6 T. L. R. 13, and many other cases.

"Even if defense papers are found insufficient, judgment should not be ordered unless plaintiff's affidavit (strictly construed) leaves no question of defendant's liability. People for use of Dyer v. Sanculius, 284 Ill. App. 463, 474-475; Weiss v. Goldberger, 209 App. Div. 615, 205 N. Y. S. 1, 3; 4 Fordham L. R. 216; Wm. H. Frear & Co., Inc. v. Bailey, 127 Misc. 79, 214 N. Y. S. 675, 677.

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"If the defense is 'arguable,' 'apparent,' made in 'good faith' it should be submitted to a jury. Fidelity & Deposit Co. v. United States for use of Smoot, 187 U. S. 315, 320. The court is bound to accept statement of facts as true when alleged in defendant's affidavits. The whole record must be considered."

Defendants contend that their counteraffidavits made out a prima facie showing that "plaintiff had actual knowledge of the defense of the defendants to the note, the defect in the title to the note or knowledge of facts which made it bad faith for the plaintiff to pay out the money on the note to Jeffries." This contention is a meritorious one. Plaintiff is forced, in its brief, to argue as to the weight and effect of the evidence, and it advances the surprising doctrine that the trial court may enter a summary judgment "when the court becomes convinced that the defense advanced is false or dishonest." It would hardly seem necessary to state that the trial court has no such power. That defendants would have a valid defense to the note if Jeffries Roofing Company was suing them upon the note is not disputed, but plaintiff claims that defendants' counteraffidavits fail to make out a prima facie case that plaintiff had knowledge of the infirmity or defect at the time the note was negotiated. There are a number of facts and circumstances that tend to make out a prima facie showing that it had such knowledge at the time the note was negotiated; that certainly tend to show that it had such knowledge before the check was paid. The affidavit of Levy Smith states that he told two representatives of plaintiff on December 22, 1941, that the work was not completed and that it was not done in a workmanlike manner. Plaintiff's check payable to the Jeffries Roofing Company is dated December 20, 1941, and was drawn on Mutual National Bank, Chicago. December 21, 1941, fell on a Sunday. The check did not go through the Clearing House until December 24, 1941, and it was not paid by Mutual National Bank until December 26, 1941.

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"It is provided by section 188 of the Negotiable Instruments Act (sec. 210, ch. 98, Ill. Rev. Stat. 1939 [Jones Ill. Stats. Ann. 89.210]) that 'A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.' See also People v. Munday, 293 Ill. 191, 127 N. E. 364. And the bank's acceptance of the check must be in writing. People v. Munday, 215 Ill. App. 365, aff'd 293 Ill. 191, 127 N. E. 364." (Gillett v. Williamsville State Bank, 310 Ill. App. 395, 402.)

Plaintiff had the right to stop payment on the check at any time before the Mutual National Bank paid it. There are other circumstances shown by defendants' affidavits that would tend to put plaintiff on its guard: (1) Jeffries indorsed the note "Without Recourse." (2) The application for the loan, defendants' Exhibit 1, shows that the job was a remodeling one; the application, the note and the certificate of completion were all dated on the same day, December 20, 1941, and upon a printed form of plaintiff. Defendants contend that plaintiff should have known that a remodeling job for \$1,000 could not be commenced and completed in one day. (3) It is perfectly clear that the two signatures to the application for the loan, Levy Smith and Janie L. Smith, were not signed by defendants, and that both signatures were written by one person. (4) The certificate of completion purports to have been signed by Janie L. Smith alone, but the contract with the Jeffries Roofing Company was signed by Levy Smith, and not by Janie L. Smith. (5) No waivers of mechanics' liens were submitted to plaintiff. (6) The written contract for the work to be done called only for the payment by defendants of \$475.

Under the record we are satisfied that defendants are entitled to their day in court and to a jury trial, as they demanded. The judgment of the Municipal court of Chicago is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR FURTHER PROCEED-
INGS.

Sullivan, P. J., and Friend, J., concur.

"It is provided by section 188 of the negotiable instruments Act (sec. 210, ch. 98, Ill. Rev. Stat. 1939 [Jones Ill. Stats., Ann. 89.210]) that 'A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.' See also People v. Wundray, 293 Ill. 191, 127 N. E. 364. And the bank's acceptance of the check must be in writing. People v. Wundray, 215 Ill. App. 365, aff'd 293 Ill. 191, 127 N. E. 364." (Quillert v. Williamsville State Bank, 310 Ill. App. 395, 402.)

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Under the record we are satisfied that defendants are entitled to their day in court and to a jury trial, as they demanded. The judgment of the Municipal Court of Chicago is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

UNSUBMITTED AND CLOSING
REMARKS FOR FURTHER PROCEEDINGS.

Sullivan, P. J., and Friend, J., concur.

42283

POWELL BROS. INC., a corporation,

Appellant,

v.

THE PENN MUTUAL LIFE INSURANCE
COMPANY OF PHILADELPHIA, a
corporation,

Appellee.

318 I.A. 643

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Honorable William J. Lindsay,
Judge Presiding.

PER CURIAM OPINION:

This is a suit brought to enforce the double indemnity provisions of a life insurance contract entered into on April 13, 1928, whereby the defendant insured the life of John E. Powell in favor of plaintiff, in the sum of \$25,000, with an additional like sum payable under double indemnity provisions. The case was tried before a jury, resulting in a verdict for defendant.

Powell Bros., Inc., at the time of the making of the contract of insurance was a firm of paving contractors, consisting of William H. Powell and his brother. John E. Powell, the assured, was a former employee of Powell Bros., Inc., and a son of William H. Powell.

On January 7, 1940, the insured, while driving his automobile upon U. S. Highway No. 60, near Tempe, Arizona, was killed in a collision, which took place to the left of the center of the highway, with another automobile. The insurance company paid the single death indemnity but denied liability for double indemnity by virtue of a certain exclusion clause in its contract.

The clause of the policy in controversy is, as follows:

"DOUBLE INDEMNITY BENEFIT

The Company agrees to pay Twenty-five Thousand Dollars, in addition to and together with the face amount of this Policy, upon receipt of due proof that the death of the insured resulted solely from bodily injuries effected directly and exclusively by external, violent and accidental means, and that such death occurred within sixty days after sustaining such injuries.

POWELL BROS., INC., a corporation,

Appellant,

v.

THE PEOPLES MUTUAL LIFE INSURANCE
COMPANY OF PHILADELPHIA, A
corporation,

Respondent.

THE QUESTION:

This is a suit brought to enforce the double indemnity provisions of a life insurance contract entered into on April 13, 1929, whereby the defendant insured the life of John H. Powell in favor of plaintiff, in the sum of \$25,000, with an additional like sum payable under double indemnity provisions. The case was tried before a jury, resulting in a verdict for defendant. Powell Bros., Inc., at the time of the making of the contract of insurance was a firm of having contractors, consisting of William H. Powell and his brother, John H. Powell, the assured, was a former employee of Powell Bros., Inc., and a son of William H. Powell.

On January 7, 1940, the insured, while driving his automobile upon U. S. Highway No. 80, near Tempe, Arizona, was killed in a collision, which took place to the left of the center of the highway, with another automobile. The insurance company paid the single death indemnity but denied liability for double indemnity by virtue of a certain exclusion clause in its contract. The clause of the policy in controversy is as follows:

"DOUBLE INDEMNITY EXEMPT"

The Company agrees to pay twenty-five thousand dollars in addition to and together with the face amount of this policy, upon receipt of due proof that the death of the insured resulted solely from bodily injuries effected directly and exclusively by external, violent and accidental means, and that such death occurred within sixty days after sustaining such injuries.

This Double Indemnity Benefit shall not be payable if the death of the insured resulted directly or indirectly from illness or disease of any kind or from physical or mental infirmity; from poison administered whether accidentally or intentionally by the insured or by another; from self-destruction at any time whether sane or insane; from any violation of law by the insured; from aeronautic or submarine casualty; * * *."

The defendant claims that the death of the insured resulted from violation of law within the meaning of the above clause.

The complaint alleges the execution and delivery of the policy and the undertakings of the Company, including the payment of the face amount plus Twenty-five Thousand Dollars, and that the refusal was vexatious and without reasonable cause, and asked the court to tax as costs in said action, in addition to all other costs, the sum of twenty-five per cent of the amount claimed for its reasonable attorneys' fees.

The answer recites four sections of the revised statutes of Arizona which defendant alleged to be in force and effect at the time of the accident, the said sections being, as follows:

"Sec. 1688. Any person under the influence of intoxicating liquor or narcotic drugs, or who is an habitual user of narcotic drugs, who shall drive any vehicle upon any highway within this state shall be guilty of a misdemeanor and punished by imprisonment in the county jail for not less than ninety days nor more than one year, or by fine of not less than two hundred nor more than five thousand dollars."
(Sec. 1, p. 131, Ch. 6, L. '27, 4th S. S.)

"Sec. 1689. Any person who drives any vehicle upon a highway without due caution and at a speed or in a manner endangering or likely to endanger any person or property, shall be guilty of a misdemeanor and punished by imprisonment in the county jail for not less than five nor more than ninety days, or by a fine of not less than twenty-five dollars, nor more than two hundred and fifty dollars, or by both such fine and imprisonment." (Sec. 2, p. 131, id.)

"Sec. 1692. Upon all highways of sufficient width the driver of a vehicle shall drive the same upon the right half of the highway and shall drive a slow moving vehicle as closely as possible to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway, and except when overtaking and passing another vehicle."

"Sec. 1587. No person shall drive a vehicle upon a highway at a speed greater than is reasonable and prudent, having due regard to the traffic, surface and width of the highway and the hazard at intersections and any other conditions then existing." (L. '33, c. 42, Sec. 1, Amending L. '31-'32, 1st S. S., c. 15, Sec. 1, which amended R. C. '28, Sec. 1587.)

It then charged that the death of the insured resulted directly from the violation by the insured of each of the above sections of the Arizona statute, namely: in that he was at said time and place driving the motor vehicle in which he was riding while he was under the influence of intoxicating liquor; that at said time and place he was driving said motor vehicle without due caution and at a speed greater than was then and there reasonable and prudent, having due regard to the traffic, surface, and width of the highway, to-wit: in excess of forty-five miles per hour, and in a manner which endangered the persons then and there upon said highway, and particularly the persons driving in the automobile with which he collided; that at the time of the said collision, the said insured was driving a motor vehicle on the left of the center of the public highway upon which he was then driving, although said highway was of sufficient width that he might have driven to the right of the center of said highway; that he was driving on the left side of the highway at a speed in excess of forty-five miles per hour, and in a reckless manner in utter disregard of the safety of other persons then and there upon the highway.

Defendant admits that it refused to pay the amount provided as double indemnity but denied that its refusal to pay was vexatious and without reasonable cause.

The theory of the plaintiff is that the clause exempting the insurer from the payment of double indemnity benefits "if the death of the insured resulted directly or indirectly * * * from any violation of law by the insured" does not apply to a case where the alleged violation of law was a mere statutory misdemeanor or one malum prohibitum as distinguished from one malum in se.

"Sec. 1807. No person shall drive a vehicle upon a highway at a speed greater than is reasonable and prudent, having due regard to the traffic, surface and width of the highway and the character of intersections and any other conditions then existing." (A. S. C. 1933, Sec. 1, amended A. S. C. 1937, Sec. 1, which amended A. S. C. 1938, Sec. 1807.)

It then charged that the death of the insured resulted directly from the violation by the insured of each of the above sections of the Arizona statute, namely: in that he was at said time and place driving the motor vehicle in which he was riding while he was under the influence of intoxicating liquor; that at said time and place he was driving said motor vehicle without due caution and at a speed greater than was then and there reasonable and prudent, having due regard to the traffic, surface, and width of the highway, to-wit: in excess of forty-five miles per hour, and in a manner which endangered the persons then and there upon said highway, and particularly the persons driving in the automobile with which he collided; that at the time of the said collision the said insured was driving a motor vehicle on the left of the center of the public highway upon which he was then driving, although said highway was of sufficient width that he might have driven to the right of the center of said highway; that he was driving on the left side of the highway at a speed in excess of forty-five miles per hour, and in a reckless manner in utter disregard of the safety of other persons then and there upon the highway. Defendant admits that it refused to pay the amount provided as double indemnity but denies that its refusal to pay was vexatious and without reasonable cause.

The theory of the plaintiff is that the clause exempting the insurer from the payment of double indemnity benefits "if the death of the insured resulted directly or indirectly " " from any violation of law by the insured" does not apply to a case where the alleged violation of law was a mere statutory misdemeanor or one which prohibition is distinguished from one which is not.

It is the theory of the defendant that the language of the exclusion clause covers death resulting from a violation of any statute penal in nature.

It would appear from the statement of facts in this case that the plaintiff was the beneficiary under a life insurance policy providing for the payment of the sum of \$25,000 for natural death and an additional \$25,000 if the insured's death resulted solely from bodily injuries inflicted directly and exclusively by external violence and accidental means and that such death occurred within sixty days after sustaining such injuries. There does not appear to be any dispute that death occurred in this manner, but the defense, as indicated before, was that the death resulted directly or indirectly in violation of law by the insured and therefore fell within the exclusion clause of the double indemnity provisions.

The policy was entered into on April 13, 1928 and called for annual premium payments of \$532, of which \$21 annually was in payment of the double indemnity benefits. The insured was killed on January 7, 1940 on a highway near Mesa, Arizona, as a result of a collision between the car which insured was driving and another automobile. There was evidence offered tending to prove each of the allegations of the affirmative defense.

From the statements of fact that are in the briefs there does not appear to be substantial dispute as to the facts in this case. The evidence which was offered by the defendant established that the accident in which the insured was killed occurred on January 7, 1940 on a highway near Mesa, Arizona. It appears from the evidence that at 1:30 P.M. on the day of the accident the insured, John Powell, was seen at a local golf club in a drunken condition, swaying as he walked, talking so that he could be heard but not understood by the witness who was only five feet away. When the insured tried to sit on his haunches he kept falling over, so he stood up. Sometime

It is the theory of the defendant that the language of the exclusion clause covers death resulting from a violation of any statute penal in nature.

It would appear from the statement of facts in this case that the plaintiff was the beneficiary under a life insurance policy providing for the payment of the sum of \$50,000 for natural death and an additional \$2,000 if the insured's death resulted solely from bodily injuries inflicted directly and exclusively by external violence and accidental means and that such death occurred within sixty days after sustaining such injuries. There does not appear to be any dispute that death occurred in this manner, but the defense, as indicated before, was that the death resulted directly or indirectly in violation of law by the insured and therefore fell within the exclusion clause of the double indemnity provision. The policy was entered into on April 13, 1933 and called for annual premium payments of \$32, of which \$1 annually was in payment of the double indemnity benefit. The insured was killed on January 7, 1940 on a highway near Mesa, Arizona, as a result of a collision between the car which insured was driving and another automobile. There was evidence offered tending to prove each of the allegations of the affirmative defense.

From the statement of facts that are in the briefs there does not appear to be substantial dispute as to the facts in this case. The evidence which was offered by the defendant established that the accident in which the insured was killed occurred on January 7, 1940 on a highway near Mesa, Arizona. It appears from the evidence that at 1:30 P.M. on the day of the accident the insured, John Powell, was seen at a local pool club in a drunken condition, saying as he walked, saying as that he could be heard but not understood by the witness who was only five feet away. When the insured tried to sit on the bench he lost his footing and fell over, as he stood up, fell

between six and seven that evening, Powell entered the Green Frog Cafe, a tavern in Mesa. Page, the bartender, according to the evidence which was heard, testified that when Powell came in he was drunk; that when he asked for a drink Page refused to serve him, telling him that he was too drunk. There was further evidence before the jury that some time after six o'clock that evening the witness Skaggs was driving west on the four-lane highway between Mesa and Phoenix; that this highway was forty feet wide, with wide dirt shoulders on each side; that Powell drove up behind him and almost ran into the rear of his car, crossed over to the left side of the highway off of the pavement, and then back off of the right side of the pavement; that meanwhile, noticing that several other cars behind him had left the road and that Powell was going back to the left side again, Skaggs pulled off of the right side of the pavement; then Powell passed him and went up the road swerving from one side to the other; Skaggs followed him, staying about 100 yards behind. After Powell had gone from one side of the road to the other several times, narrowly missing a telephone post, he headed across to the left half of the road into a string of cars coming in the opposite direction. All of the other witnesses to the accident testified to the same general facts.

Another witness that was heard by the jury and who was approximately a quarter of a mile behind Powell, driving in the same general direction at the time of the accident, testified to the same facts. He said that when Powell "dove" across the highway into the oncoming cars, the leading car turned off the highway. The cars almost sideswiped, Powell barely missing the second car in returning to the center of the highway. He then "dove" back directly into the oncoming third car driven by Mr. Langford, striking it in the extreme south or left lane.

Mae Stanley, who was driving in the direction opposite to Powell, testified that when the car ahead of her pulled off the road, she thought something was wrong and pulled off of the road too. Shortly thereafter, Powell's car streaked by within reaching distance and crashed into the Langford car immediately behind her. Mr. Langford testified that Powell's car came diagonally across the road, almost hit the car in front of him, and then came directly into his car. He estimated the speed of Powell's car at fifty to seventy miles per hour. The other witnesses to the accident estimated the speed at "forty-five miles or more" and "fifty miles or better". This was a forty-five mile zone.

When Skaggs got to the scene of the accident, others were picking up the Langford child from the pavement by the side of Powell's car. Skaggs and the other witnesses testified that the Langford car, which had been going east, was in the southernmost of the four lanes, and Powell's car was smashed into it almost head-on.

There was evidence by four witnesses who testified that there were liquor bottles in the car after the accident, and the man who took Powell out of the wreck smelled whiskey in the car and about Powell as he held him in his arms.

The only evidence offered for the plaintiff corporation was that of Powell's widow and her sister. Mrs. Powell testified that her husband smelled of liquor on the day before the accident and that it was his usual habit to "go on a binge" for a period of time when he started drinking, but that he had not been drinking on the day of the accident. The sister testified that about half an hour before the accident, Powell was sober at her house -- which is about a block and a half from the Green Frog Cafe.

The plaintiff suggests that the trial court should have directed a verdict on behalf of plaintiff at the close of all of the evidence offered on behalf of the defendant, for the reason that the exclusion clause in the policy, to-wit, "any violation of

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... the evidence offered on behalf of the defendant, for the reason
... that the exclusion alone in the policy, to-wit, "any violation of

law by the insured" does not mean mere traffic violations or violations which are merely malum prohibitum, but means rather common law misdemeanors or felonies, or crimes which are in their nature malum in se. The plaintiff contends that a violation of any of the four sections of the Arizona Code relied upon by the defendant is a misdemeanor solely by virtue of the statute does not involve moral turpitude and that a criminal intent is not necessary to convict thereunder. The statutes, it is contended, are all in aid of the police power of the state, the principle of which is "the greatest good to the greatest number", and that violations of such statutes are malum prohibitum only, and not malum in se, citing The People v. Johnson, 288 Ill. 442.

It was further suggested by the plaintiff that since there is no allegation or proof of any violation of law other than the aforesaid statutory provisions there was no question for the jury to decide, unless the language of the policy be construed as excusing the insurance company from liability where the death resulted from a violation by the insured of a statute defining an offense which is merely malum prohibitum.

It is further suggested by the plaintiff that the question involved, so far as the plaintiff was able to find, has never been directly passed upon by the courts of this state. As a matter of fact there are surprisingly few decisions in jurisdictions outside of the State of Illinois. It is suggested, however, by the plaintiff that one case directly supports the contention of the plaintiff, the facts having been directly presented and passed upon in Van Riper v. Constitutional Government League, (Wash. 1939) 96 P. (2d) 588, whereas in four other jurisdictions the contrary has been held. After stating the facts in the case just referred to and the relevant statute, the court said:

law by the insured" does not mean mere traffic violations or violations which are merely malum prohibitum, but means rather common law misdemeanors or felonies, or crimes which are in their nature malum in se. The plaintiff contends that a violation of any of the four sections of the Illinois Code relied upon by the defendant is a misdemeanor solely by virtue of the statute does not involve moral turpitude and that a criminal intent is not necessary to convict thereunder. The statute, it is contended, are all in aid of the police power of the state, the principle of which is "the greatest good to the greatest number", and that violations of such statutes are malum prohibitum only, and not malum in se, citing The People v. Johnson, 288 Ill. 442. It was further suggested by the plaintiff that since there is no allegation or proof of any violation of law other than the foregoing statutory provisions there was no question for the jury to decide, unless the language of the policy be construed as exonerating the insurance company from liability where the death resulted from a violation by the insured of a statute defining an offense which is merely malum prohibitum. It is further suggested by the plaintiff that the question involved, so far as the plaintiff was able to find, has never been directly passed upon by the courts of this state. As a matter of fact there are surprisingly few decisions in jurisdictions outside of the State of Illinois. It is suggested, however, by the plaintiff that one case directly supports the contention of the plaintiff, the facts having been directly presented and passed upon in Van Riper v. Constitutional Government League, (Iowa, 1930) 98 P. (2d) 580, where in four other jurisdictions the contrary has been held. After stating the facts in the case just referred to and the relevant statute, the court said:

" * * * we have for decision but one question, namely, whether his violations were 'criminal' and fell within the exception of the provision quoted above. * * *

"The rule is well settled generally that a condition voiding a life insurance policy if the death of the insured is caused by, or is the direct result of, the violation of any law, is a valid enforceable provision. 6 Couch, Cyclopedia of Insurance Law, pp. 4511 et seq., Sec. 1236; 6 Cooley's Briefs on Insurance (2d ed.), pp. 5201 to 5215. Some of the cases recognizing that a traffic violation is a 'violation of law' within the meaning of such an exemption clause in an insurance policy are the following: [citing cases.]

"However, the authorities just cited are not controlling of the question here, for the reason that the exception in the certificate under consideration was not for 'a violation of law', nor for 'any violation of law,' but for 'acts committed in criminal violation of law.' The appellant in this case chose to use the more restricted phrase in its certificate.

"The question, then, is, whether the meaning of the conventional phrase 'in violation of law', or its equivalent, as generally used, was changed by the insertion of the word 'criminal' before the word 'violation'."

After examining various definitions of the word "criminal" found in standard dictionaries, the court said:

"We quote these standard lexicons because they give not only the technical, but also the popular, meaning of the word 'criminal.' * * *

"We believe that the word 'criminal,' as used in the certificate, was meant to signify an act done with malicious intent, from evil nature, or with a wrongful disposition to harm or injure other persons or property. Certainly, none of these obliquities could be ascribed to Mr. Van Riper, who had in his charge, upon the particular occasion, his wife and daughters."

However, one of the leading cases in the federal courts is Flannagan v. Provident Life & Accident Ins. Co., 22 F. (2d) 136. In that case there were two policies which excluded accidents encountered while violating law. The defendants offered evidence to prove that the insured was driving while under the influence of liquor in violation of the Virginia statute. In affirming the judgment for the defendants entered by the trial court upon a directed verdict, the court said:

"From the evidence in this case no materially different inferences may be reasonably drawn. The deceased was running an automobile while intoxicated, within the meaning of the Virginia statute; above cited, and in so doing was violating the Virginia law. This being true, under the conditions

"We have for a long time been asking the question, namely, whether his violation was 'criminal' in the sense of the exception of the provision quoted above."

"The rule is well settled generally that a condition voiding a life insurance policy if the death of the insured is caused by, or is the direct result of, the violation of any law, is a valid and enforceable provision. *W. G. Jones, Developments of Insurance Law*, pp. 411 et seq., 1232; *5 Jones*, *Deaths of the Insured* (1928), pp. 3201 to 3215. Some of the cases recognizing that a traffic violation is a 'violation of law' within the meaning of such an exception clause in an insurance policy are the following: *Levinson v. American Insurance Co.*, 100 Cal. 100, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

"The question, then, is, whether the meaning of the conventional phrase 'in violation of law' or its equivalent, as generally used, was changed by the insertion of the word 'criminal' before the word 'violation'."

"After examining various definitions of the word 'criminal' found in standard dictionaries, the court said:

"We quote these standard definitions because they give not only the technical, but also the popular, meaning of the word 'criminal.' ... We believe that the word 'criminal,' as used in the certificate, was used to signify an act done with malicious intent, from evil nature, or with a wrongful disposition to harm or injure other persons or property. Merely, none of these qualifications could be ascribed to Mr. Van Riper, who had in his career, upon the particular occasion, his wife and daughter."

However, one of the leading cases in the later courts is Flanagan v. Provident Life & Accident Ins. Co., 22 F. (2d) 126.

In that case there were two collisions which a divided accident encountered while violating law. The defendant offered evidence to prove that the insured was driving while under the influence of liquor in violation of the Virginia statute. In affirming the judgment for the defendant entered by the trial court upon a divided verdict, the court said:

"From the evidence in this case no materially different inference may be reasonably drawn. The deceased was driving an automobile while intoxicated, within the meaning of the Virginia statute, above cited, and in so doing was violating the Virginia law. This being true, under the conditions

of the policies sued on, there was no resultant liability for his death.

"It is contended on behalf of the plaintiff that the policy should be construed strictly against the insurer and liberally in favor of the assured, and that such construction would render the defendants liable. * * *

"If at all ambiguous, it is fundamental that contracts of insurance are to be construed most strongly against the insurer." * * *

"But this rule cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties. * * *"

One of the cases that is called to the attention of the court by the defendant is the case of Witt v. Spot Cash Ins. Co., 128 Kan. 155, 276 P. 804. That case discusses many of the cases which establish the law there followed. In that case the insured was admittedly attempting to turn a corner at a speed of thirty miles an hour in violation of a statute setting the speed limit for turning corners at eight miles an hour. After finding that the insured's excessive speed in violation of the statute caused the injury, the court reversed the judgment for the plaintiff with instructions to enter judgment for the defendant. The court quoted the applicable law from the syllabus of the case of Flannagan v. Provident Life & Accident Ins. Co., 22 F. (2d) 136, as follows:

"Insurance companies held not liable on accident insurance policies for death of insured, resulting from injuries sustained while driving automobile in intoxicated condition, in violation of Prohibition Law * * * under policy provisions excepting from coverage accidents encountered while violating the law."

The defendant has called to our attention additional motor law violation cases in which the violation was held to fall within the exclusion clause, noting the type of violation and the specific wording of the policy:

Provident Life & Accident Ins. Co. v. Eaton, 84 F. (2d) 528, 530 (reckless driving--"while violating law");

Order of United Commercial Travelers v. Tripp, 63 F. (2d) 37, 39 (driving while under the influence of liquor and exceeding speed ordinance -- "violation of any law");

Provident Life & Accident Ins. Co. v. Dance, 76 F. (2d) 384 (driving while intoxicated -- "violation of law");

of the policies used on, there was no personal liability for his death.
"It is contended on behalf of the plaintiff that the policy should be construed strictly against the insurer and liberally in favor of the insured, and that such construction would render the defendant liable." * * *
"If at all possible, it is fundamental that contracts of insurance are to be construed and strictly against the insurer." * * *
"But this rule cannot be applied at its fullest extent terms of a contract expressed with sufficient clarity to convey the plain meaning of the parties." * * *

One of the cases that is cited to the attention of the court by the defendant is the case of Hill v. First Cash Ins. Co., 128 Kan. 155, 276 P. 804. That case discusses many of the cases which established the law there followed. In that case the insured was admittedly attempting to turn a corner at a speed of thirty miles an hour in violation of a statute setting the speed limit for turning corners at eight miles an hour. After finding that the insured's excessive speed in violation of the statute caused the injury, the court reversed the judgment for the plaintiff with instructions to enter judgment for the defendant. The court quoted the applicable law from the syllabus of the case of Lafayette v. Provident Life & Accident Ins. Co., 25 F. (2d) 138, as follows:

"Insurance companies did not liable on accident insurance policies for death of insured, resulting from injuries sustained while driving automobile in intoxicated condition, in violation of prohibition law." * * * and policy provisions limiting recovery to certain accidents occurred while violating the law."

The defendant has called to our attention additional motor law violation cases in which the violation was held to fall within the exclusion clause, noting the type of violation and the

specific wording of the policy:
Provident Life & Accident Ins. Co. v. Eaton, 84 F. (2d) 828, 320 (Prohibition driving--"while violating law");
Order of United Commercial Travelers v. Eaton, 83 F. (2d) 17, 38 (Driving while under the influence of liquor and exceeding speed ordinance -- "violation of any law");
Provident Life & Accident Ins. Co. v. Eaton, 83 F. (2d) 17, 38 (Driving while intoxicated -- "violation of law");

Davilla v. Liberty Life Ins. Co., 114 Cal. App. 308, 299 P. 831, 835 (exceeding speed limit -- "while violating the law");

National Life & Accident Ins. Co. v. Sutherland, 64 Ga. App. 72, 12 S. E. (2d) 183 (speeding and under the influence -- "in connection with violation of law");

Whyte v. Union Mutual Casualty Co., 209 Ia. 917, 227 N. W. 518 (driving while intoxicated on wrong side of road and speeding--"any violation of the law");

Geddes & M. Undertaking & Embalming Co. v. First Nat. Life Ins. Co., (La. App. 1936), 167 So. 881 (driving under the influence of liquor -- "violation of law");

St. Clair v. Washington Fidelity Nat. Ins. Co., (Mo. App., 1936), 89 S. W. (2d) 85 (speeding--"while violating any law");

Ayres v. Atlas Ins. Co., 123 Neb. 285, 242 N. W. 604 (speeding--"while violating the law");

Flath v. Bankers' Cas. Co., 49 N. D. 1053, 194 N. W. 739 (speeding and transporting liquor-- "violating any law");

Bowers v. Great Eastern Cas. Co. 260 Pa. 147, 103 A. 536 (exceeding speed limit--"violating laws"-- this case is cited on another point at page 19 of plaintiff's brief);

Southwestern Life Ins. Co. v. Green, (Tex. Civ. App. 1937), 101 S. W. (2d) 594, 597 (exceeding speed limit--"any violation of law");

Mutual Life Ins. Co. v. Grimsley, 160 Va. 325, 168 S. E. 329 (driving on left side of road-- "any violation of law");

Collins v. Woodmen of World Life Ins. Soc. (W. Va. Sup. Ct. App., 1942), 19 S. E. (2d) 586, 589 (driving on left side of road--"in violation of law");

Annotation, 125 A.L.R. 1104.

Considering the foregoing cases cited by the defendant we carefully applied the rules that were offered in considering the question as to the liability of the defendant for the recovery of the double indemnity, and in considering these cases it is apparent that these citations are of material benefit upon the question that is before this court, and in so considering them to reach a conclusion that will justify a judgment that was entered in the instant case. There are other cases that have been quoted and we have considered them all. It is important of course to

Quill v. Liberty Life Ins. Co., 114 Cal. App. 2d 295 P. 831, 836 (exceeding speed limit -- while violating the law);

National Life & Accident Ins. Co. v. Westland, 14 Cal. App. 2d 19, 19 P. 2d 183 (exceeding speed limit -- while violating the law);

Hyatt v. United Fidelity Co., 102 Cal. App. 2d 217, 221 P. 2d 115 (driving while intoxicated on wrong side of road and exceeding -- "any violation of the law");

Quill v. Liberty Life Ins. Co., 114 Cal. App. 2d 295 P. 831, 836 (exceeding speed limit -- "violation of law");

Hyatt v. United Fidelity Co., 102 Cal. App. 2d 217, 221 P. 2d 115 (driving while intoxicated on wrong side of road and exceeding -- "any violation of law");

Hyatt v. United Fidelity Co., 102 Cal. App. 2d 217, 221 P. 2d 115 (driving while intoxicated on wrong side of road and exceeding -- "any violation of law");

Hyatt v. United Fidelity Co., 102 Cal. App. 2d 217, 221 P. 2d 115 (driving while intoxicated on wrong side of road and exceeding -- "any violation of law");

Hyatt v. United Fidelity Co., 102 Cal. App. 2d 217, 221 P. 2d 115 (driving while intoxicated on wrong side of road and exceeding -- "any violation of law");

Hyatt v. United Fidelity Co., 102 Cal. App. 2d 217, 221 P. 2d 115 (driving while intoxicated on wrong side of road and exceeding -- "any violation of law");

Hyatt v. United Fidelity Co., 102 Cal. App. 2d 217, 221 P. 2d 115 (driving while intoxicated on wrong side of road and exceeding -- "any violation of law");

Hyatt v. United Fidelity Co., 102 Cal. App. 2d 217, 221 P. 2d 115 (driving while intoxicated on wrong side of road and exceeding -- "any violation of law");

Annotation, 125 A.L.R. 1104.

Considering the foregoing cases cited by the defendant

we carefully noted the rules that were entered in considering

the question as to the liability of the defendant for the recovery

of the double indemnity, and in considering these cases it is

apparent that these situations are of material benefit upon the

question that is before this court, and in so considering them

to reach a conclusion that will justify a judgment that was entered

in the instant case. There are other cases that have been quoted

and we have considered them all. It is important of course to

determine the question as to whether the plaintiff's violations were such as would justify a recovery. One of the cases relied upon by the plaintiff to create a distinction as to the right to recover was whether the violation was malum prohibitum or a violation malum in se. A case that was relied on is Treolo v. Auto Ins. Underwriters, 348 Ill. 93. The policy in that case provided that the defendant company would not be liable for claims on account of accidents occurring while said automobile is being used for transporting intoxicating liquor. The court held that there was no evidence even remotely tending to prove that the car was being so used, although the court specifically said that the question whether such transportation was a violation of the law was not an issue in the case. The court talked about unintentional violation of law, and then made the following statement:

"To say that because an insured violates such regulatory laws which are merely malum prohibitum and not malum in se is to place an unnatural or strained construction on the policy."

However, that is a question that is not really an issue in the case. The question is, from the facts as they were established by the evidence in this case did the plaintiff have a cause of action that would justify the entry of a judgment. When we come to consider all the facts as well as the authorities that have been cited we are of the opinion that the court was justified in sustaining the verdict of the jury. There is a case, People v. Townsend, 214 Mich. 267, 183 N. W. 177, in which the defendant was convicted of involuntary manslaughter, the evidence indicating that he was driving while he was intoxicated at the time of an automobile accident in which the person riding in the car with him was killed. The court said in that case:

before the question as to whether the plaintiff's violation was such as would justify a recovery. One of the issues raised upon by the plaintiff to establish a violation as to the right to recover was whether the violation was a violation of a violation of the law. It is true that the plaintiff in United States v. [redacted] was held to be liable for a violation of the defendant company would not be liable for a violation of the defendant company while this automobile is being used for transportation in the line of business. The court held that there was no evidence even remotely tending to prove that the car was being used, although the court specifically said that the question whether such transportation was a violation of the law was not an issue in the case. The court failed to mention a violation of law, and then made the following statement:

"To say that because an insured violated such regulatory laws which are merely regulatory and not criminal in nature is to place an unusual or strained construction on the policy."

However, that is a question that is not really an issue in the case. The question is, from the facts as they were established by the evidence in this case did the plaintiff have a right of action that would justify the entry of a judgment. Then we come to consider all the facts as well as the circumstances that have been cited we are of the opinion that the court was justified in sustaining the verdict of the jury. There is a case, United v. Townsend, 214 Mich. 287, 183 N. W. 177, in which the defendant was convicted of involuntary manslaughter, the evidence indicating that he was driving while he was intoxicated at the time of an automobile accident in which the person riding in the car with him was killed. The court said in that case:

"Counsel is in error in assuming that the act of defendant in operating his automobile upon a public highway while intoxicated was an act merely malum prohibitum and not malum in se. It is true the statute forbids it and provides a penalty, but this in no way determines whether it is only malum prohibitum. The purpose of the statute is to prevent accidents and preserve persons from injury, and the reason for it is that an intoxicated person has so befuddled and deranged and obscured his faculties of perception, judgment, and recognition of obligation toward his fellows as to be a menace in guiding an instrumentality so speedy and high-powered as a modern automobile. Such a man is barred from the highway because he has committed the wrong of getting drunk and thereby has rendered himself unfit and unsafe to propel and guide a vehicle capable of the speed of an express train and requiring its operator to be in possession of his faculties."

And the court goes on to consider the question further. We are rather of the opinion that this opinion is an authority for the purpose for which this case was appealed, and that is to determine whether under the facts and circumstances as we have them in this case Powell, who was driving the automobile, was guilty of the acts such as took place, and we are of the opinion that the trial court was fully justified in affirming the verdict of the jury.

There is one question, however, that we ought to consider and that/^{is} whether it was error to refuse the proximate cause instruction offered by the plaintiff because that instruction was substantially covered by the instructions given. It appears that the court gave four instructions which referred to evidence in the case. The first instruction recited the provision of the Arizona speeding statute, and then said that if at the time of the collision Powell was driving in violation of law and "if you further find from a preponderance of the evidence that the collision in which he was fatally injured resulted from such driving by him at a speed greater than was reasonable and prudent at that time and place, having due regard to the traffic, surface and width of the highway and any other conditions then existing, then you shall find the issues in favor of the defendant."

"Counsel is in error in assuming that the act of defendant in operating his automobile upon a public highway while intoxicated was an act merely prohibited and not malum in se. It is true the statute forbids it and provides a penalty, but this in no way determines whether it is only a malum prohibitum. The purpose of the statute is to prevent accidents and preserve persons from injury, and the reason for it is that an intoxicated person has no judgment and is incapable of observing his duties as a driver. It is a violation of obligation toward his fellow men to be in the highway in such a condition. Such a man is bound to cover as a matter of course, and he has committed the wrong of putting himself and thereby has rendered himself unfit and unsafe to drive and guide a vehicle capable of the speed of an express train and requiring its operator to be in possession of his faculties."

And the court goes on to consider the question further. We are rather of the opinion that this opinion is an authority for the purpose for which this case was appealed, and that is to determine whether under the facts and circumstances as we have them in this case Lowell, who was driving the automobile, was guilty of the acts such as took place, and we are of the opinion that the trial court was fully justified in affirming the verdict of the jury.

There is one question, however, that we ought to consider and that is whether it was error to refuse the proffered cause instruction offered by the plaintiff because that instruction was substantially covered by the instructions given. It appears that the court gave four instructions which referred to evidence in the case. The first instruction recited the provision of the statute relating thereto, and then said that it at the time of the collision Lowell was driving in violation of law and that you further find from the preponderance of the evidence that the collision in which he was fatally injured resulted from such driving by him at a speed greater than was responsible and prudent at that time and place, having due regard to the traffic, surface and width of the highway and any other conditions then existing, then you shall find the issues in favor of the defendant."

And again in the second instruction the court recited the provisions of the Arizona statute on reckless driving, and then said that if at the time of this collision Powell was driving in violation of that statute and "if you further find from a preponderance of the evidence that the automobile collision in which he was fatally injured resulted from said John E. Powell driving said automobile at a speed or in a manner endangering any person on said highway, then you shall find the issues in favor of the defendant."

The third instruction covered the provisions of the Arizona statute which prohibits driving while under the influence of liquor, and then said "if from a preponderance of the evidence you find that at the time John E. Powell was fatally injured, he was driving an automobile upon a public highway in the State of Arizona while under the influence of intoxicating liquor, and if from a preponderance of the evidence you find that the automobile collision in which he was fatally injured resulted from the driving by him of the automobile while under the influence of intoxicating liquor, then you shall find the issues for the defendant."

The fourth instruction that was given calls attention to the Arizona statute regarding driving on the right half of the highway and that a violation of such statutory provision constituted a misdemeanor. The instruction then continued: "You are instructed further that if at the time and place of the automobile collision in which John E. Powell was fatally injured he was driving an automobile upon a highway in the State of Arizona upon the left half of the highway at a time and place at which the highway was of sufficient width and it was practicable for him to drive upon the right half of said highway, and if you further find from a preponderance of the evidence that the automobile collision in which he was fatally injured resulted from his driving said automobile upon the left half of the highway at a time and at a

And again in the second instruction the court recited the provisions of the Arizona statute on reckless driving, and then said that at the time of this collision Howell was driving in violation of that statute and "if you further find from a preponderance of the evidence that the automobile collision in which he was fatally injured resulted from said John L. Howell driving said automobile at a speed or in a manner endangering any person on said highway, then you shall find the issues in favor of the defendant."

The third instruction covered the provisions of the Arizona statute which prohibits driving while under the influence of liquor, and then said "if from a preponderance of the evidence you find that at the time John L. Howell was fatally injured, he was driving an automobile upon a public highway in the State of Arizona while under the influence of intoxicating liquor, and if from a preponderance of the evidence you find that the automobile collision in which he was fatally injured resulted from the driving by him of the automobile while under the influence of intoxicating liquor, then you shall find the issues for the defendant."

The fourth instruction that was given calls attention to the Arizona statute regarding driving on the right half of the highway and that a violation of such statutory provision constituted a misdemeanor. The instruction then continued: "You are instructed further that at the time and place of the automobile collision in which John L. Howell was fatally injured he was driving an automobile upon a highway in the State of Arizona upon the left half of the highway at a time and place at which the highway was of sufficient width and it was practicable for him to drive upon the right half of said highway, and if you further find from a preponderance of the evidence that the automobile collision in which he was fatally injured resulted from his driving said automobile upon the left half of the highway at a time and at a

place where the highway was of sufficient width and it was practicable to drive upon the right half of the highway, then you shall find the issues in favor of the defendant."

It does not appear that any of these instructions that were given by the court were such as would justify a reversal in this case.

There is a question here upon an instruction that omitted the use of the word "proximate" and a case is cited entitled Fischer v. Midland Casualty Co., 189 Ill. App. 486, in which the plaintiff relied on and stated the law in terms of results and not of cause, and the phrase "proximate cause" was not even mentioned. The court there held:

"A clause in an accident insurance policy limiting liability in case of injury or death 'resulting, directly or indirectly, * * * from exposure to obvious risk of injury or known danger, * * * or while violating law,' held to apply only when the injury results from the causes named * * *."

The Illinois courts have recognized that the phrase "proximate cause" unless defined and explained is "not calculated to enlighten the jury as to the law". (Swift & Co. v. Bennard, 128 Ill. App. 181, 186). Plaintiff's requested instruction in the case before this court did not define the phrase, and merely served to obscure the clear statement of the law in the instructions given.

So when we have examined the instructions as well as the evidence the verdict appears to be clearly relying on the merits and the judgment of the court affirming it will not be reversed even though an instruction may have been erroneously refused. Calling attention to the law in Illinois it appears that a verdict which is clearly right on the evidence will not be

reversed although an instruction may have been erroneously refused.

As the court said in Chicago, B. & Q. R. R. Co. v. Warner, 108 Ill. 538, 554-555:

"Where the reviewing court can see the case has been fairly tried, and that the judgment is clearly right upon the facts, and that consequently another trial must necessarily result the same way, it will not reverse on the ground an erroneous instruction may have been given or a proper one has been refused."

From the facts as we have considered them and the authorities and laws that have been called to our attention, we are of the opinion that the court was right in not directing a verdict for the plaintiff and in refusing the instruction offered by the plaintiff.

Substantial justice has been done and the judgment of the trial court for the defendant is affirmed.

AFFIRMED.

reversed although an instruction may have been erroneously refused.

as the court said in Chicago, R. & N. W. R. Co. v. Carter, 102

Ill. 327, 334-335:

"Where the reviewing court can see the error has been fairly tried, and that the instruction is clearly right upon the facts, and that consequently no error in the trial necessarily results the same way, it will not reverse on the ground an erroneous instruction was given or a proper one has been refused."

From the facts as we have considered them and the authorities and laws that have been called to our attention, we are of the opinion that the court was right in not directing a verdict for the plaintiff and in refusing the instruction offered by the plaintiff.

Substantial justice has been done and the interest of

the trial court for the defendant is affirmed.

AFFIRMED.

Abstract

GEN. NO. 9855

AGENDA NO. 33

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A.D. 1942

318 I.A. 643²

M. L. JOSLYN, ET AL.,

APPELLEES,

vs.

CHARLOTTE C. JOSLYN,
Individually and as next
friend of Joy Lou Joslyn,
et al.,

APPELLANTS.

APPEAL FROM THE CIRCUIT

COURT OF LAKE COUNTY.

HUFFMAN, P. J.

This case comes to this court by transfer from the Supreme Court (380 Ill. 181). The nature of the case and the contentions of the parties appear in the above opinion.

This is a proceeding by appellee, M. L. Joslyn, to foreclose a trust deed on certain real estate. Appellant, Charlotte C. Joslyn, denied that appellee was the true owner of the notes in question, claiming her former husband, George R. Joslyn, was in fact the real owner thereof, and denied the right of appellee to have foreclosure.

Albany

Oct. 20, 1903

IN THE SUPREME COURT OF THE STATE OF NEW YORK

IN SENATE

October 20, A.D. 1903

314.643

M. L. WELLS, ET AL.,

Appellants,

vs.

COMMONWEALTH OF NEW YORK,
Respondent.

APPEAL.

APPEAL FROM THE COURT
OF COMMON PLEAS

8

WESTMAN, J. J.

This case comes to this court by certiorari from
the Supreme Court (Sess. 11, 1903). The record of the
case and the conclusions of the judicial branch in
the above captioned.

This is a proceeding by certiorari, and the
court forecloses a review of the record in this
Appellate, and the court, having been satisfied
that the facts of the case in question, stated
in the former judgment, George H. Wells, was not
that the real owner thereof, and denied the right
of appellee to have immediate.

Appellant filed a counterclaim against her former husband, George R. Joslyn, seeking certain relief based upon a separation agreement between them of June 12, 1938. The husband by his answer, averred that such agreement had been entirely repudiated by his former wife, and had been mutually abandoned by the parties. It appears that in a separate maintenance action and later in a divorce suit by the wife, she alleged the agreement was procured from her by fraud, false representations and inducements, claiming the same was of no legal effect, and asking that it be declared null and void. Among other things, the agreement provided that the husband should pay \$1000, per month to the wife for the support of herself and children.

The divorce proceedings terminated in a decree for the wife wherein the husband was ordered to pay her \$500, per month for the support of herself and children. She subsequently filed her petition to have this allowance increased to \$1500, per month, and to cause her former husband to discharge the mortgage indebtedness involved in this suit, or to indemnify her from all liability thereunder, pursuant to the agreement of June 12, 1938. After a hearing, this petition was denied by the chancellor.

In this present case, appellant's counterclaim was dismissed for want of equity, and decree for foreclosure granted upon appellee's complaint. We are not

Appellant filed a counterclaim against her former husband, George H. Jolly, seeking relief based upon a separation agreement between them of June 18, 1933. The husband in his answer, averred that such agreement had been entirely rescinded by his former wife, and had been entirely abandoned by the parties. It appears that on a separate maintenance action and later in a divorce suit by the wife, she alleged the agreement was rescinded from her by him, false representations and inducements, claiming the same was of no legal effect, and asking that it be declared null and void. Among other things, the agreement provided that she should pay \$1000 per month to the wife for the support of herself and children.

The divorce proceedings terminated in a decree for the wife wherein the husband was ordered to pay her \$500 per month for the support of herself and children. She subsequently filed her petition to have this allowance increased to \$1000 per month, and to cause her former husband to discharge the mortgage indebtedness involved in this suit, on to indemnify her from all liability outstanding, pursuant to the agreement of June 18, 1933. After a hearing, this petition was denied by the chancellor.

In this present case, appellant's counterclaim was dismissed for want of equity, and decree for divorce granted upon appellee's complaint. It was not

disposed to disturb the decree as to these matters.

Appellant filed many objections to the master's report. The abstract contains 262 pages, of which 58 pages are devoted to the master's report, and 53 pages to appellant's objections thereto. One of the objections is directed toward the master's fees. The master certified a total fee of \$1775.50. Of this total, the sum of \$235, was charged for taking evidence. The balance of \$1540, consists of a charge of \$35, per day for 44 days spent in connection with the case. The court overruled the objections to the master's fees. In view of the expression of the Supreme Court in Klee-kamp v. id, 275 Ill. 98, and Kerner v. Peterson, 368 Ill. 59, 82, such a charge cannot stand when reduced to a per diem basis.

The objections to the master's fees comprise but a few lines. Reference thereto in the brief of appellant, consists of approximately 6 pages out of a total of 135 pages. Under such circumstances, it cannot be considered that such objections comprise any substantial portion of the record on this appeal. The certificate of such services by the master showing the various days spent, comprises about 2 pages of the abstract.

When the matter came on for hearing before the chancellor, it appears counsel for appellant was requesting an apportionment of the master's fees. The court requested him to indicate his attitude as to the reasonableness of the master's fees, and what amount he was

disposed to distrust the entries in the ledger.

Appellant filed many objections to the ledger's report. The abstract contains 262 pages, of which 103 pages are devoted to the master's report, and 159 pages to appellant's objections thereto. The master's report is directed toward the master's loss, the master certified a total loss of \$1775.00. In this total, the sum of \$285, was charged for taking expenses. The balance of \$1490, consists of a sum of \$135, for day for 44 days spent in connection with the case. The court overruled the objections to the master's loss. In view of the expression of the Supreme Court in Wamp v. 10, 235 Ill. 98, and Wamp v. 10, 235 Ill. 98, such a charge cannot stand when reduced to a plain basis.

The objections to the master's loss comprise but a few lines. Reference thereto in the bill of exceptions consists of approximately 6 pages out of a total of 159 pages. Under such circumstances, it cannot be considered that such objections comprise any substantial portion of the record on this appeal. The certificate of such service by the master showing the various days spent, contains about 2 pages of the abstract.

When the matter came on for hearing before the Chancellor, it appears from the appellant's report that an appointment of the master's loss. The court reported that to indicate the balance as to the master's loss of the master's loss, and what amount he was

insisting should be allowed, and in what proportion the fees should be apportioned. Appellant's counsel declined to express an opinion in this regard, whereupon the trial court stated that due to his evasive attitude and his refusal to offer any proof in support of objections to the master's fees, and his statement that he had no opinion in the matter, should preclude him from any further consideration. However, the court did apportion the fees. He found the record disclosed that about 29 pages of the transcript of the record were required in connection with the foreclosure suit, and that 1100 pages of the transcript were devoted to what he termed, appellant's groundless defense to the foreclosure, and her spurious counterclaim. The court apportioned 25% of the fees against plaintiff-appellee, and 75% against appellant. We are in accord with the court's action in this respect.

With respect to the allowance of master's fees in the sum of \$1775.50, the decree is reversed, and judgment entered in this court for master's fees in the sum of \$895, consisting of \$235, for his statutory charges for taking evidence, and \$15, per day for 44 days spent in connection with his report.

Decree affirmed with judgment for master's fees in this court.

Decree affirmed.

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Abstract

313 I.A. 644'

GEN. NO. 9856

AGENDA NO. 9

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FEBRUARY TERM, A. D. 1943

MARY ANNA HEITMANN

vs.

JOHN MAX HEITMANN

JOHN MAX HEITMANN,

APPELLANT,

vs.

HELEN HOLT and CECIL
HOLT,

APPELLEES.

APPEAL FROM THE CIRCUIT
COURT OF GRUNDY COUNTY.

HUFFMAN, P. J.

This suit has to do with the custody of a seven year old girl. She is the child of appellant, who was married to a sister of appellee, Helen Holt. Appellant's wife procured a divorce from him in November, 1941. By the decree rendered therein, she was granted the sole custody of the child in question. About eight months before the divorce proceedings, and while appellant and his wife were living together, the child was given to appellees to care for and support.

Albion

31314.644

1940

1940

IN THE SUPREME COURT OF THE STATE OF ALABAMA
JAMES EARL RAY, JR.
vs.
JAMES EARL RAY, JR.

STATE OF ALABAMA
vs.
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JAMES EARL RAY, JR.

APPEAL FROM THE CIRCUIT COURT OF THE STATE OF ALABAMA

1940

This suit was filed with the clerk of a court
year old girl. She is the child of appellant, and
was married to a sister of appellant, James Earl
Ray, Jr. Appellant's wife proposed a divorce from him in 1939-
40, 1941. By the divorce judgment, she was
granted the sole custody of the child in question.
About eight months before the divorce proceedings,
and while appellant and his wife were living together,
the child was given in appellant to care for and support.

She has remained with them ever since. In June, 1942, the mother of the child died. Soon thereafter, appellant filed his petition for custody. Appellees also filed their petition asking for custody. These petitions were consolidated for hearing, and the court awarded custody to appellees. The father has prosecuted this appeal from such order.

The father bases his right to custody under the general provisions of sec. 284 of the Administration Act (Ch. 3, sec. 284, 1941 Ill. St.), together with the claim that he is entitled to the right to the custody of his child as against the world where it appears he is a competent and fit person to have such custody, and it does not appear that the welfare of the child demands its custody should be elsewhere.

After a full and careful consideration of the evidence of the father's habits and custom toward the care and custody of this child prior to its going to live with appellees, and its life and environment as well as care and treatment with appellees, we are of the firm conviction that the welfare of the child requires its custody should be elsewhere than with its father. It would serve no good purpose to detail the facts in the case as reflected by the evidence.

The judgment of the circuit court awarding custody of Mary Anna Heitmann to appellees is affirmed.

Judgment affirmed.

The has remained with him ever since. In June, 1923,
the mother of the child died. Soon thereafter, appeal-
ant filed his petition for custody. Appellee also
filed their petition asking for custody. These peti-
tions were consolidated for hearing, and the court
awarded custody to appellee. The father has proce-
eded to appeal from such order.

The father bases his right to custody upon the
general provisions of sec. 234 of the Wisconsin
Statutes (Ch. 5, sec. 234, 1941 Wis. Stat.), together with the
claim that he is entitled to the right to the custody
of his child as against the world where it appears he
is a competent and fit person to have such child,
and it does not appear that the welfare of the child
demands its custody should be elsewhere.

After a full and careful consideration of the
evidence of the father's habits and custom toward the
care and custody of this child prior to its going to
live with appellee, and its life and environment as
well as care and treatment with appellee, we are of
the firm conviction that the welfare of the child
requires its custody should be elsewhere than with the
father. It would serve no good purpose to retain the
fact in the case as reflected by the evidence.
The judgment of the circuit court awarding custody
of the child to appellee is affirmed.
Judgment affirmed.

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

318 I.A. 644²

FEBRUARY TERM, A. D. 1943

GENERAL ELECTRIC COMPANY,
a corporation,

Plaintiff-Appellee

vs.

GELLMAN MANUFACTURING COMPANY,
a corporation,

Defendant-Appellant

APPEAL FROM THE
CIRCUIT COURT OF
ROCK ISLAND COUNTY.

329

603

DOVE, J.:

Appellee filed its complaint in the Circuit Court of Rock Island County to recover the purchase price of electrical equipment sold by the plaintiff to the defendant. Thereafter defendant filed its answer and counter-claim and on December 19, 1941 the defendant in the counter-claim (appellee here) filed a demand for the defendant to file a bill of particulars. According to the order entered on March 26, 1942 the court, on February 26, 1942, entered an order upon the defendant to file a bill of particulars within ten days. This order was not complied with and on March 16, 1942 plaintiff filed a motion to strike the answer and counter-claim of appellee for failure to comply with the order of February 26th. Upon a hearing this motion was sustained and on March 26, 1942 the court entered an order striking the answer of

MICHAEL AND TAMARA A. JENSEN

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On March 26, 1940 the court entered an order granting the answer of February 24th. When the court entered this order it was satisfied that answer and counter-claim of plaintiff failed to comply with the filed with it on March 16, 1940 plaintiff failed to comply to strike the file. Plaintiff is within the right. This order was not com- court, on February 26, 1940, entered an order upon the defendant to of defendants. According to the order entered on March 26, 1940 the claim (appealed from) filed a return for the purpose of the file. All and counter-claiming on March 16, 1940 and defendant in the counter- the plaintiff do not believe. Plaintiff defendant filed the answer County to remove the matter to the court of appeals and the order by

the defendant and also its counter-claim from the files and entered a default against the defendant. The judgment, after ordering the answer and counter-claim stricken, continues: "And now the said defendant moves for leave of court to file answer and counter-claim and a bill of particulars within ten days which motion is denied by the court. And now the said plaintiff moves the court for default against the said defendant, which motion is allowed and the said defendant is ruled in default on the original complaint herein for failure to plead as provided by law. It is further ordered by the court that in the event of an appeal an appeal bond shall be filed in the sum of \$500.00 with surety to be approved by the clerk of this court."

The record further shows that on the following day, March 27, 1942, the court rendered judgment in favor of the plaintiff and against the defendant for \$1096.52 and awarded execution and provided that in the event of an appeal from said judgment, the amount of the bond was fixed at \$2500.00. Subsequently, defendant entered its motion to vacate this judgment and upon a stipulation entered into by the parties the court entered an order vacating and setting aside that judgment.

On April 10, 1942 defendant filed its notice of appeal. This notice of appeal recites that appellant "hereby appeals to the Appellate Court of Illinois for the Second District from the order entered in this case on the 26th day of March, A. D. 1942 striking the answer and counter-claim theretofore filed in the above entitled cause by Gellman Manufacturing Company, a corporation, defendant and cross-plaintiff and from the order of default entered on said date. Plaintiff prays that the said orders may be reversed or set aside and that the Appellate Court direct the trial court to grant leave to defendant and cross-plaintiff to file their answer and counter-claim in said proceedings or that such other or further proceedings or orders may be had or taken as to the Appellate Court may seem proper."

the defendant and also the counter-claim from the files and entered a default against the defendant. The judgment, after ordering the answer and counter-claim to be struck, continued: "And now the said defendant moves for leave of court to file answer and counter-claim and a bill of particulars within ten days which claim is denied by the court. And now the said plaintiff moves the court for default against the said defendant, which motion is allowed and the said defendant is ruled in default on the original complaint herein for failure to plead as provided by law. It is further ordered by the court that in the event of an appeal an appeal shall be filed in the sum of \$500.00 and entry to be allowed by the clerk of this court."

The record further shows that on the following day, March 23, 1942, the court rendered judgment in favor of the plaintiff and by that the defendant for \$100.00 and awarded execution and provided that in the event of an appeal from said judgment, the amount of the bond was fixed at \$500.00. Subsequently, defendant moved the court to set aside this judgment and upon a stipulation entered into by the parties the court entered an order vacating and setting aside said judgment. On April 10, 1942 defendant filed its notice of appeal. This notice of appeal recites that appellant "herby appeals to the appellate Court of Illinois for the Second District from the order entered in this case on the 23rd day of March, A. D. 1942 striking the answer and counter-claim theretofore filed in the above entitled cause by Gelman Manufacturing Company, a corporation, defendant, and cross-plaintiff and from the order of default entered on said date. Plaintiff prays that said order may be reversed or set aside and that the appellate Court direct the trial court to grant leave to defendant and cross-plaintiff to file their answer and counter-claim in said proceedings or that such other or further proceedings or orders may be had as shall be to the appellate Court may seem proper."

The errors relied upon for reversal are as follows:

1. The trial court erred in entering ex parte a rule to file a bill of particulars without proof of previous service of notice.
2. No effort was made to show that the allegations of the answer and cross complaint were "so wanting in details, that the opposite party should be entitled to a bill of particulars".
3. No notice was filed or served wherein there were pointed out specifically the details complained of or the details desired.
4. Defendant had no opportunity to appear and resist the application for bill of particulars or to limit its scope.
5. The trial court misapprehended his powers under Section 37 Civil Practice Act and unduly punished defendant for an unintentional noncompliance with the ex parte order.

The civil practice act provides that appeals shall lie to the Supreme Court and to this court to revise the final judgments, orders, or decrees of the Circuit Court except as to certain enumerated interlocutory orders. (Ill. Rev. Stat. 1941, chap. 110, secs. 77 and 78.) Where the record discloses that an appeal is attempted to be taken from an order which is not final, this court is bound of its own motion to dismiss the appeal, notwithstanding the appellee fails to make a motion to dismiss. *Prange v. City of Marion*, 297 Ill. App. 353. *Eglin v. Glatz*, 287 Ill. App. 44. This court has no alternative but to dismiss an appeal taken from anything other than a final judgment except where such appeal is specifically authorized by statute. *Reynolds v. Wangelin*, 314 Ill. App. 12. An appeal will not lie from a finding or conclusion either of law or fact not accompanied by any final judgment. *Eggleston v. Morrison*, 185 Ill. 577. A final judgment is one which finally disposes of the rights of the parties either upon the entire controversy or upon some definite and separate branch thereof. *Orwig v. Conley*, 322 Ill. 291.

The error relied upon for reversal was as follows:

1. The trial court erred in entering an order to file

a bill of particulars without proof of previous service of notice.

2. No effort was made to show that the allegations of the

answer and cross complaint were "so wanting in detail, that the

opposite party should be entitled to a bill of particulars."

3. No notice was filed or served wherein the date was pointed

out specifically the details complained of or the details desired.

4. Defendant had no opportunity to appear and resist the

application for bill of particulars or to file an answer.

5. The trial court misapplied the powers under section 27

Civil Practice Act and unduly punished defendant for an unintentional

noncompliance with the ex parte order.

The civil practice act provides that appeals shall lie to the

supreme court and to this court to revise the final judgments, orders,

or decrees of the circuit court except as to certain enumerated inter-

locutory orders. (Ill. Civ. Pract. Act, Chap. 110, Secs. 27 and 28.)

When the record discloses that an appeal is attempted to be taken

from an order which is not final, this court is bound of its own motion

to dismiss the appeal, notwithstanding the appellate rules to make a

motion to dismiss. *Tracy v. City of Marion*, 222 Ill. app. 353. Again

v. Great, 287 Ill. app. 44. This court has no alternative but to dis-

miss an appeal taken from anything other than a final judgment except

when such appeal is specifically authorized by statute. *Reynolds v.*

Wargelin, 317 Ill. app. 12. An appeal will not lie from a finding

or conclusion either of law or fact not accompanied by a final judg-

ment. *Harrison v. Harrison*, 155 Ill. 377. A final judgment is one

which finally disposes of the rights of the parties with regard to

entire controversy or upon some definite and separate branch thereof.

Gray v. Conley, 222 Ill. 131.

The order appealed from struck the answer and counter-claim of the defendant, denied the motion of the defendant for leave to file an answer and counter-claim and bill of particulars within ten days and entered a default against the defendant. The trial court and the parties recognized that there was a further step to be taken and on March 27, 1942 a final judgment was rendered, but by agreement of the parties, the motion of the defendant to vacate this judgment was sustained and the only final order from which an appeal could be taken was vacated and set aside by the court. Had the court denied that motion, then under the authorities the order denying the motion would have been final and may be reviewed by appeal, but where the motion is allowed and the judgment is set aside no appeal lies therefrom. *Andrews v. Mattewson*, 306 Ill. App. 282. *City of Park Ridge v. Murphy*, 258 Ill. 365, 258 Ill. 365. A judgment is one that finally disposes of the rights of parties and is the law's last word and the final consideration and determination of a court upon a matter submitted to it in a judicial controversy. *People, ex rel v. Crane*, 372 Ill. 228. It is reviewable only when it terminates litigation upon the merits, so that execution might issue thereon. *LeMenager v. Northwestern Barb Wire Co.*, 296 Ill. App. 568; *Daab v. Ritter*, 294 id. 203; *Thompson v. Industrial Commission*, 377 Ill. 587.

The judgment appealed from not being a final, appealable judgment, the appeal must be dismissed.

Appeal dismissed.

The order appealed from struck the answer and counter-claim of
 the defendant, denied the motion of the defendant for leave to file
 an answer and counter-claim and bill of particulars within ten days
 and entered a default against the defendant. The trial court and
 the parties recognized that there was a further step to be taken and
 on March 27, 1942 a final judgment was rendered, but by agreement of
 the parties, the motion of the defendant to vacate this judgment was
 sustained and the only final order from which an appeal could be taken
 was vacated and set aside by the court. Had the court denied that
 motion, then under the authorities the order denying the motion would
 have been final and may be reviewed by appeal, but where the motion is
 allowed and the judgment is set aside no appeal lies therefrom. *Andrews*
v. Matteson, 306 Ill. App. 388. A judgment is one that finally dis-
 poses of the rights of parties and is the law of the land and the
 final consideration and determination of a court upon a matter submitted
 to it in a judicial controversy. *People, ex rel v. Crane*, 372 Ill. 388.
 It is reviewable only when it terminates litigation upon the merits,
 so that execution might issue thereon. *Leibinger v. Northwestern Bank*
Wire Co., 296 Ill. App. 368; *Map v. Ritter*, 324 Ill. 303; *Thompson v.*
Industrial Commission, 377 Ill. 587.
 The judgment appealed from not being a final, reviewable judgment,
 the appeal must be dismissed.
 Appeal dismissed.

318 I.A. 645¹

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1943

LINDBLOOM AUTO PARTS COMPANY,
a corporation,

Appellee,

vs.

LIBERTY FOUNDRIES CO., and BURD
PISTON RING COMPANY, corpora-
tions,

Appellants.

APPEAL FROM

CIRCUIT COURT

OF WINNEBAGO COUNTY.

DOVE, J.:

Appellee recovered a judgment of \$1753.34 against appellants in the circuit court of Winnebago County, under a written contract between appellee and Liberty Foundries Co., which, with a companion contract between the same parties, was executed for and on behalf of both appellants, and the cause is here on appeal from the judgment.

The two contracts were executed at the same time on February 9, 1934. Under one of them appellants acquired the right to manufacture certain devices on which appellants held patents. The contract in controversy reads as follows:

"This Agreement made and entered into this 9 day of February, 1934, by and between Lindbloom Auto Parts Company, A corporation of Illinois, of Chicago, Illinois, hereinafter called party of the first part, and Liberty Foundries Co., an Illinois corporation, having its principal office and place of business at Rockford, Illinois, hereinafter called party of the second part.

Witnesseth, That,
"Whereas, the said party of the first part is the owner of Patents Nos. 1, 470, 276 and 1,683,293 covering devices known as Lindbloom Valve Packings to be installed on the intake valve stems of gasoline engines; and

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IN THE

APPELLATE COURT OF THE STATE

SECOND DISTRICT

RENEWAL TERM, A. D. 1945

| | | |
|--|------------|--------------------|
| <p>LIBERTY MOUNTAIN CO., and BIRD
PISTON RING COMPANY, corpora-
tions,</p> | <p>vs.</p> | <p>Appellants,</p> |
| <p>Appellees,</p> | <p>vs.</p> | <p>Appellants,</p> |
| <p>LIBERTY MOUNTAIN CO., and BIRD
PISTON RING COMPANY, corpora-
tions,</p> | <p>vs.</p> | <p>Appellants,</p> |
| <p>Appellees,</p> | <p>vs.</p> | <p>Appellants,</p> |

DOVE, J.:

Appellee recovered a judgment of \$1752.32 against appellants in the circuit court of Randolph County, under a written contract between appellee and Liberty Foundries Co., which, with a connection contract between the same parties, was executed for and on behalf of both appellants, and the cause is here on appeal from the judgment.

The two contracts were executed at the same time on February 9, 1934. Under one of them appellants acquired the right to manufacture certain devices on which appellants held patents. The contract in controversy reads as follows:

"This agreement made and entered into this 9 day of February, 1934, by and between Lindbloom Auto Parts Company, a corporation of Illinois, of Chicago, Illinois, hereinafter called party of the first part, and Liberty Foundries Co., an Illinois corporation, having its principal office and place of business at Rockford, Illinois, hereinafter called party of the second part.

Witness, That, Whereas, the said party of the first part is the owner of Patents Nos. 1,470, 278 and 1,681,893 covering devices known as Lindbloom Valve Pistons to be installed on the intake valve stems of gasoline engines; and

"Whereas, the party of the second part is desirous of acquiring certain rights formerly held by Heckman Machine Works, of Chicago, Illinois, operating as Lindbloom Valve Packing Company, of Chicago, Illinois, which was formerly licensed by the party of the first part under said Letters Patent; and

"Whereas, the Lindbloom Valve Packing Company now owes Lindbloom Auto Parts Company a certain sum of money.

"Now, Therefore, in consideration of their mutual promises, the parties hereto agree as follows:

"1. The party of the first part agrees to assign and does hereby assign to the party of the second part its account receivable owing to it from Lindbloom Valve Packing Company and agrees to assist the party of the second part to collect such account.

"2. The party of the second part agrees to pay to the party of the first part such sums for royalty as are shown to be due on January 16, 1934, when the contract between the party of the first part and Lindbloom Valve Packing Company was cancelled, such sum, however, not to be less than \$3207.08 (Thirty Two Hundred and Seven Dollars and Eight Cents) as shown by the Statement of Lindbloom Valve Packing Company dated December 1, 1933, plus 2 cts. (Two Cents) for each valve packing sold by Lindbloom Valve Packing Company since December 1, 1933.

"3. The party of the second part agrees to pay \$1000.00 (One Thousand Dollars) on account of signing this agreement, \$1000.00 (One Thousand Dollars) in 30 (thirty) days hereafter, and \$1000.00 (One Thousand Dollars) in 60 (sixty) days hereafter, and the balance in ninety days.

"Lindbloom Auto Parts Company,
By A. C. Lindbloom, President,
Liberty Foundries Co.,
By F. W. White, President."

Attached to the contract is the following statement:

"Copy Heckman Machine Works,
Chicago, Ill.
To

Lindbloom Auto Parts Co. Dr.

"1933

| | | | |
|--------|-------------------------------------|------------|----------------|
| Dec. 1 | 25934 units Lindbloom Valve Packing | at 10 cts. | 2593.40 |
| | 100 Hissox Springs | at 10 cts. | 10.00 |
| | 145383 Lindbloom Packings sold, Roy | at 2 cts. | <u>2907.66</u> |
| | | | 5511.06 |

"Payments on above account claimed by Heckman Machine Works but not admitted by Lindbloom Auto Parts Co.

2303.98
3207.08"

Another attached statement reads in part as follows:

"Copy Lindbloom Valve Packing Co.
4022 West Lake Street
Chicago, Ill.

"Whereas, the party of the second part is desirous of acquiring certain rights formerly held by Heckman Machine Works, of Chicago, Illinois, operating as Lindholm Valve Packing Company, of Chicago, Illinois, which was formerly licensed by the party of the first part under said Letters Patent; and

"Whereas, the Lindholm Valve Packing Company now owns Lindholm Valve Packing Company a certain sum of money. Now, Therefore, in consideration of their mutual promises, the parties hereto agree as follows:

"1. The party of the first part agrees to assign and does hereby assign to the party of the second part its account receivable owing to it from Lindholm Valve Packing Company and agrees to assist the party of the second part to collect such account.

"2. The party of the second part agrees to pay to the party of the first part such sums for royalty as are shown to be due on January 1st, 1934, then the contract between the party of the first part and Lindholm Valve Packing Company was cancelled, each sum, however, not to be less than \$3807.08 (Thirty Two Hundred and Seven Dollars and Eight Cents) as shown by the statement of Lindholm Valve Packing Company dated December 1, 1933, plus 8 cts. (two Cents) for each valve packing sold by Lindholm Valve Packing Company since December 1, 1933.

"3. The party of the second part agrees to pay \$1000.00 (One Thousand Dollars) on account of signing this agreement, \$1000.00 (One Thousand Dollars) in 30 (thirty) days hereafter, and \$1000.00 (One Thousand Dollars) in 60 (sixty) days hereafter, and the balance in ninety days.

"Lindholm Valve Packing Company,
By A. G. Lindholm, President,
Liberty Foundation Co.,
By T. W. White, President."

Attached to the contract is the following statement:

"Copy Heckman Machine Works,
Chicago, Ill.

"to
Lindholm Valve Packing Co., Inc.

| 1933 | | Dec. 1 | |
|---------|------------|---------|------------|
| 2593.40 | at 10 cts. | 2593.40 | at 10 cts. |
| 10.00 | at 10 cts. | 10.00 | at 10 cts. |
| 2603.40 | at 10 cts. | 2603.40 | at 10 cts. |
| 2613.40 | at 10 cts. | 2613.40 | at 10 cts. |

Payments on above account claimed by
Heckman Machine Works but not admitted
by Lindholm Valve Packing Co.
2603.40
2613.40

And the attached statement reads in part as follows:

"Copy Lindholm Valve Packing Co.
4022 West Lake Street
Chicago, Ill.

#August 31, 1933

"Statement of Amount due Lindbloom Auto
Parts

Original stock of valve packings received from
A. C. Lindbloom, 25935 units at .05 each 1296.75
(Original stock of 25935 units was not depleted
until April 1, 1933)"

Then follows royalty charges on sundry dates, the debit side of
the statement aggregating \$2978.15, with sundry payments of \$1551.17,
leaving a balance of \$1426.98.

Appellants made payments under the contract in controversy of
\$1000.00 on February 12, 1934, and \$1182.28 on March 15, 1934. They
claim these amounts were full payment of the obligation, by virtue of
an alleged parol understanding and agreement between the presidents of
the respective parties immediately prior to the execution of the written
contract, that the amount of \$3207.08 mentioned therein was contingent
upon an audit of the books of the Lindbloom Valve Packing Company, and
that if the audit showed any less amount to be due, appellants were to
pay only such amount as the audit showed; and that the payments of
\$2182.28 are the full amount shown by such audit.

The claim that the trial court erred in denying appellants' motion
to enter judgment for them at the close of the testimony for appellee, on
the ground that appellee did not reply to the affirmative defense of
payment in their original answer cannot be sustained. The answer after
admitting the making of the agreement as set forth in the complaint there
denies that "under and by the terms of said agreement the defendants or
either of them agreed to pay an amount not less than \$3207.08 but state
the fact to be that they promised to pay only the amount actually found
to be due * * * as shown by the books and records of the Lindbloom Valve
Packing Company, and that the amount that was found due on such account
was \$2182.28 which has been fully paid by the defendants to the plaintiff
and accepted by the plaintiff from the defendants as payment in full of
all moneys due under the terms of said agreement." This placing of

August 11, 1933

"Statement of Account due Lindholm Auto Parts

Original stock of valve packing received from A.C. Lindholm, 22835 units at .05 each 1226.75 (Original stock of 22835 units was not deducted until April 1, 1933)*

Then follows royalty of 125 on sundry dates, the debit side of the statement aggregating 3278.15, with sundry payments of 1251.17, leaving a balance of 1428.98.

Appellants were payees under the contract in controversy of \$1000.00 on February 13, 1934, and \$1182.38 on March 15, 1934. They claim these amounts were full payment of the obligation, by virtue of an alleged oral understanding and agreement between the president of the respective parties immediately prior to the execution of the written contract, that the amount of \$2307.08 mentioned therein was contingent upon an audit of the books of the Lindholm Valve Packing Company, and that if the audit showed any loss amount to be due, appellants were to pay only such amount as the audit showed, and that the payments of \$2182.38 are the full amount owed by them under said contract.

The claim that the trial court erred in denying appellants' motion to enter judgment for them upon close of the testimony for no other reason than that appellee did not reply to the affidavit before the payment in their original answer cannot be sustained. The answer after admitting the making of the agreement as set forth in the complaint then denies that under and by the terms of said agreement the defendants or either of them agreed to pay an amount not less than \$2307.08 but states the fact to be that they agreed to pay only the amount actually found to be due. The court found by the books and records of the Lindholm Valve Packing Company, and that the amount that was found due on such account was \$2182.38 which has been fully paid by the defendants to the plaintiff and accepted by the plaintiff from the defendants as payment in full of all moneys due under the terms of said agreement. This finding of

appellants' interpretation upon the terms of the contract amounts to a conclusion of law. Allegations of such conclusions not based on pleaded facts are immaterial and may be disregarded. (Phillips v. Gannon, 246 Ill. 98, 108; Macauley v. Jones, 295 id. 614; Binz v. *Tyler*, ~~295~~ 79 id. 248, 252; City of Springfield v. Kable, 306 Ill. App. 616, 620.) Neither did the so-called affirmative defense meet the requirements of section 33(2) of the Civil Practice act (Ill. Rev. Stat. 1941, chap. 110, par. 157 (2), requiring each defense to be separately pleaded, designated and numbered; nor the provisions of section 43(4) of the same act, which requires the facts constituting an affirmative defense, such as payment, to be plainly set forth. (People v. City of Chicago, 377 Ill. 573, 576; Parker v. Dameika, 372 id. 235, 237.) Furthermore, the motion was not made until after the conclusion of the testimony for appellee, and after appellants actively participated in the trial on the very question of the payments being in full of the obligation under the contract, and had introduced in evidence numerous checks and letters identified by appellee's secretary on cross-examination. By one of such letters it clearly appears that the payment was not accepted by appellee as payment in full, and by the other subsequent letters it also appears that meetings were attempted to be arranged between the presidents of the respective parties concerning the matter. Under such circumstances the filing of a reply was waived, and appellants are not in a position to take advantage of the want of a reply if one had been necessary. (Robinson v. Miller, 317 Ill. 501; Dempsey v. Burns, 281 id. 644; ~~Patt~~ v. Davis, 241 id. 434.) The trial court did not err in denying the motion.

~~The court should have~~ The contract provides that the payment shall not be less than \$3207.08 plus two cents for each valve packing sold since December 1, 1933. It was stipulated that this latter amount was \$728.54. Thus the amount called for by the contract was a minimum of those two sums, or \$3935.62. The judgment recovered, in the sum of

appellants' interpretation upon the terms of the contract amounts to
 a conclusion of law. Allegations of such conclusions not based on
 pleaded facts are immaterial and may be disregarded. (Phillips v.
 Gannon, 246 Ill. 98, 108; Macaulay v. Jones, 285 Ill. 614; Hinz v. ^{W. J. Hinz}
 79 Ill. 248, 252; City of Springfield v. Kable, 308 Ill. App.
 616, 620.) Neither did the so-called affirmative defense meet the
 requirements of section 35(2) of the Civil Practice Act (Ill. Rev.
 Stat. 1941, chap. 110, par. 157 (2), requiring each defense to be
 separately pleaded, designated and numbered; nor the provisions of
 section 43(4) of the same act, which requires the facts constitut-
 ing an affirmative defense, such as payment, to be plainly set forth.
 (People v. City of Chicago, 377 Ill. 673, 678; Parker v. Demetka, 378
 Ill. 235, 237.) Furthermore, the motion was not made until after the
 conclusion of the testimony for appellee, and after appellee's affirma-
 tive participation in the trial on the very question of the payment
 being in full of the obligation under the contract, and had introduced
 in evidence numerous checks and letters identified by appellee's testi-
 mony on cross-examination. By one of such letters it clearly appears
 that the payment was not accepted by appellee as payment in full, and by
 the other subsequent letters it also appears that restitutions were attempted
 to be arranged between the presidents of the respective parties concern-
 ing the matter. Under such circumstances the filing of a reply was waived,
 and appellants are not in a position to take advantage of the want of a
 reply if one had been necessary. (Robinson v. Miller, 317 Ill. 601;
 Dempsey v. Burn, 331 Ill. 644; 193 v. Davis, 441 Ill. 444.) The trial
 court did not err in denying the motion.
 The contract provides that the payment shall
 not be less than \$2307.08 plus two cents for each valve packing sold
 since December 1, 1933. It was stipulated that this latter amount was
 \$28.54. Thus the amount called for by the contract was a minimum of
 those two sums, or \$2335.62. The judgment recovered, in the sum of

\$1753.34, is the difference between \$3935.62 and the \$2182.28 paid by appellants.

After the denial of appellants' motion for judgment, they offered to prove by their president conversations between him and appellee's president before the contract was signed "to show this isn't the agreement between the parties," and in substance, that appellee's president said he was not sure of the amount due, and that it was agreed that if \$3207.08 was not the correct amount, that whatever amount was shown by the books of the Lindbloom Valve Packing Company was the amount that was to be paid. Appellee's objection to the testimony was sustained. Thereafter, appellants were permitted to file, over appellee's objection, an additional answer to the same effect, under a limitation that the proof would be confined to the question of consideration. Appellee filed a reply traversing the allegations of the additional answer. Over appellee's objection the president of the appellant companies testified that after the terms of the license contract were agreed upon, the question came up about the moneys owing appellee by the Lindbloom Auto Parts Company; that the conversation was that if Mr. Lindbloom (appellee's president) said that \$3207.08 was the correct amount, appellants were willing to have it put in, but wanted proof that that amount was correct by an audit of the books and Mr. Lindbloom was asked to assure them that the amount was correct, and if it was correct they would pay it, and if it was not, appellants had a right to an audit of the books on account of the Valve Company going into a receivership; and that the two contracts were then executed.

The fact that the parties contemplated payment in excess of \$3000.00 is demonstrated by the third paragraph of the contract, which provides for three payments of \$1000.00 each, and a fourth payment of the balance. The figure of \$1296.75 for 25935 units at five cents each in the statement of August 31, 1933, attached to the contract, and evidently prepared by Lindbloom Valve Packing Company, has no probative force. The contract.

\$1753.84, is the difference between \$2307.08 and the \$1882.88 paid

by appellee.

After the denial of appellants' motion for judgment, they offered

to prove by their present conversation between him and appellee's

president before the contract was signed "to show this isn't the agree-

ment between the parties," and in substance, that appellee's president

said he was not sure of the amount due, and that it was agreed that if

\$2307.08 was not the correct amount, that whatever amount was shown by

the books of the Lindholm Valve Packing Company was the amount that was

to be paid. Appellee's objection to the testimony was sustained. There-

after, appellants were permitted to file, over appellee's objection an

additional answer to the same effect, under a limitation that the proof

would be confined to the question of consideration. Appellee filed a

reply traversing the allegations of the additional answer. Over appellee's

objection the president of the appellant companies testified that after

the terms of the license contract were agreed upon, the question came

up about the money owing appellee by the Lindholm Valve Packing Company;

that the conversation was then with Mr. Lindholm (appellee's president)

said that \$2307.08 was the correct amount, appellants were willing to

have it put in, but wanted proof that that amount was correct by an

audit of the books and Mr. Lindholm was asked to assure them that the

amount was correct, and if it was correct they would pay it, and if it

was not, appellants had a right to an audit of the books on account of

the Valve Company being into a relationship; and that the two contracts

were then executed.

The fact that the parties contemplated payment in excess of \$3000.00

is demonstrated by the third paragraph of the contract, which provides

for three payments of \$1000.00 each, and a fourth payment of the balance.

The figure of \$1286.73 for \$2307.08 minus five cents, even in the statement

of August 31, 1933, attached to the contract, and evidently prepared by

Lindholm Valve Packing Company, has no probative force. The contract

makes no reference to that statement, but specifically refers to the statement of December 1, 1933, in which there is a charge of \$2593.40 for 25934 units at ten cents each, and there is no testimony which shows that this is not the correct amount, or that the units were to be charged at five cents each.

Appellants' cross-examination exhibit No. 4, being a copy of the audit of the books of the Lindbloom Valve Packing Company for royalties, through February, 1934, prepared by appellants' secretary, purports to show a balance of \$2182.28 due from the Valve Packing Company, which is the amount appellants claim to be correct. The exhibit shows sundry payments from May, 1933, to December, 1933, both inclusive, aggregating \$1097.28. The checks of the Lindbloom Valve Packing Company introduced in evidence by appellants, covering the same period, show payment of only \$874.28, which is \$223.00 short of the amount shown by the exhibit.

Appellants urge in this court that there was no consideration for the contract. The contract licensing the manufacture of the patented devices and the contract in controversy were executed at the same time. The latter recites the desires of Liberty Foundries Co. to acquire the right formerly held by the Heckman Machine Works, operating as Lindbloom Valve Packing Company, the debt of the latter to appellee, the assignment of the account to Liberty Foundries Co., and the promise to pay such sums "for royalty" as shown to be due when the former contract was cancelled, not less, however, than \$3207.08, and two cents for each valve packing sold since December 1, 1933. The words "for royalty" are significant as being a part of the royalty to be paid for the manufacturing rights acquired. This was a sufficient consideration for the contract, in addition to the assignment of the account. Furthermore, a want of consideration was not pleaded or relied upon by appellants in the trial court but the defense interposed was payment in full, and want of consideration cannot be urged here.

makes no reference to that statement, but specifically refers to the statement of December 1, 1933, in which there is a charge of \$3883.40 for 38834 units at ten cents each, and there is no testimony which shows that this is not the correct amount, or that the units were to be charged at five cents each.

Appellants' cross-examination exhibit No. 4, being a copy of the audit of the books of the Lindholm Valve Packing Company for royalties, through February, 1934, prepared by appellants' secretary, purports to show a balance of \$2182.28 due from the Valve Packing Company, which is the amount appellants claim to be correct. The exhibit shows monthly payments from May, 1933, to December, 1933, both inclusive, aggregating \$1097.28. The checks of the Lindholm Valve Packing Company introduced in evidence by appellants, covering the same period, show payment of only \$874.28, which is \$258.00 short of the amount shown by the exhibit.

Appellants argue in this court that there was no consideration for the contract. The contract licensing the manufacture of the patented devices and the contract in controversy were entered at the same time. The latter recites the parties of Liberty Formulas Co. to acquire the right formerly held by the Western Machine Works, operating as Lindholm Valve Packing Company, the debt of the latter to appellees, the assignment of the account to Liberty Formulas Co., and the promise to pay such sums "for royalty" as shown to be due when the former contract was cancelled, not less, however, than \$3207.02, and two cents for each valve packing said since December 1, 1933. The words "for royalty" are significant as being a part of the royalty to be paid for the manufacturing rights secured. This was a sufficient consideration for the contract, in addition to the assignment of the account. Furthermore, a part of consideration was not pleaded or relied upon by appellants in the trial court but the defense interposed was payment in full, and want of consideration cannot be urged here.

Appellants called appellee's secretary as a witness with the avowed purpose of proving the charge of ten cents each for 25,934 units of valve packing in the statement of December 1, 1933, was a mistake and that the proper charge was five cents per unit, or \$1296.75; that settlement therefor at five cents per unit and for the 100 Hissox springs at ten cents per unit, totaling \$1306.75, was made on August 14, 1933, by a check for \$110.58, and credits of \$1196.17 as shown on a statement accompanying said check. Several checks were marked for identification and the witness testified they bore the signature of Mr. Lindbloom on the reverse side and were cashed and bore perforated cancellations. He also identified another document as a copy of an original which came with one of the checks. None of these checks nor the other document was introduced in evidence, and there is no further description of them in the abstract. The witness was not interrogated as to the correct price of the valve packing units.

The testimony of appellants not only fails to show that the correct charge for the valve packing units was only \$1296.75, but fails to show that any amount was paid for them, and the only checks introduced in evidence are \$223.00 short of the amount claimed to have been paid as shown by their exhibit No. 4.

Payment is an affirmative defense. (Department of Finance v. Schmidt, 374 Ill. 351, 354.) Even under the theory of appellants that parol testimony to show the true consideration for a written contract is admissible, it was incumbent upon them to show payment of the amount they claim was due under their theory. This they failed to do. Consequently, it is unnecessary to discuss the question of whether the negotiations between the parties prior to the execution of the written contract were merged therein.

Appellants called appellee's secretary as a witness with the
avowed purpose of proving the charge of ten cents each for 25,934
units of valve packing in the statement of December 1, 1933, was
a mistake and that the proper charge was five cents per unit, or
\$1298.75; that statement therefor at five cents per unit and for
the 100 Hixox springs at ten cents per unit, totaling \$1300.75,
was made on August 14, 1933, by a check for \$13.54, and credits
of \$1300.17 to the account on a statement accordingly said check. Sev-
eral checks were marked for identification and the witness testi-
fied they bore the signature of Mr. Lindholm on the reverse side
and were cashed and have returned cashed. He also identi-
fied another document as a copy of an original which came with one
of the checks. None of these checks nor any other documents was
introduced in evidence, and there is no further description of them
in the testimony. The witness was not interrogated as to the correct
price of the valve packing units.
The testimony of appellee's not only failed to show that the cor-
rect charge for the valve packing units was only \$1298.75, but failed
to show that any amount was paid for same, and the only checks intro-
duced in evidence are \$123.00 credit of the amount claimed to have been
paid as shown by their exhibit No. 4.
Appellant is an affirmative defense. (Department of Finance v.
Schmidt, 374 Ill. 351, 354.) When under the theory of appellee's last
part testimony to show the true consideration for a written contract
is admissible, it was incumbent upon them to show payment of the amount
they claim was due under their theory. This they failed to do. Conse-
quently, it is unnecessary to discuss the question of whether the differ-
ence between the parties as to the amount of the valve packing
was correct or not.

Appellants having failed to show the amount due was less than the \$3935.62 called for by the contract, the trial court correctly entered judgment for the difference between that amount and the subsequent payments of \$2182.28. The judgment is therefore affirmed.

Judgment affirmed.

Appellants having failed to show the amount due was less than the \$250.00 called for by the contract, the trial court correctly entered judgment for the difference between that amount and the amount of \$250.00. The judgment is therefore affirmed.

Judgment affirmed.

Abstract

GEN. NO. 9858

AGENDA NO. 11

IN THE

313 I.A. 645²

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1943

ED HAUGENS,

Appellant

vs.

C. C. VISSERING and F. C. KLEASATH,
Partners under the name and style
of THE DANA GRAIN COMPANY,

Appellees.

APPEAL FROM

CIRCUIT COURT OF
LA SALLE COUNTY.

DOVE, J.:

On April 1, 1936, W. E. Wilhelm purchased from appellant a McCormick-Deering tractor and a McCormick-Deering cultivator for \$770.00 and executed a conditional sales note, payable in two installments, \$365.75 due December 31, 1936, and \$404.25 due December 31, 1937, with interest from maturity at 6%. Appellant endorsed the note to the International Harvester Company "without recourse", and under date of August 6, 1936, by another endorsement, the "without ^{recourse} ~~recourse~~" was voided and appellant guaranteed payment of the face value of the note. Appellees acquired the note from the International Harvester Company on May 27, 1938, through the First State Bank, of Wenona, Illinois, for the then unpaid balance of \$205.15.

31.11.1945

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1945

ED HAUGERS,

Appellant

vs.

C. C. VILKING and F. O. KILGATH,
Partners under the name and style
of THE DATA GRAIN COMPANY,

Appellees.

APPEAL FROM

CIRCUIT COURT OF

LA SALLE COUNTY.

DOVE, J. J. :

On April 1, 1936, W. E. Wilheim purchased from appellant a McCormick-Deering tractor and a McCormick-Deering cultivator for \$770.00 and executed a conditional sales note, payable in two installments, \$385.75 due December 31, 1936, and \$404.25 due December 31, 1937, with interest from maturity at 6%. Appellant endorsed the note to the International Harvester Company "with-
out recourse", and under date of August 6, 1936, by another en-
dorsement, the "without recourse" was voided and appellant guaran-
teed payment of the face value of the note. Appellees acquired the note from the International Harvester Company on May 27, 1936, through the First State Bank, of Menomonee, Illinois, for the then unpaid balance of \$208.15.

Appellant recovered a judgment by confession in the circuit court of Livingston County against W. E. Wilhelm on July 20, 1938, for \$565.21, on another indebtedness not connected with the above transaction. Execution on the judgment was issued and delivered to the sheriff of that county on the same day, and was returned unsatisfied on October 18, 1938. An alias execution was issued and delivered to the sheriff on the next day, and was returned in no part satisfied on January 17, 1939. During the month of December, 1938, while the alias execution was in the hands of the sheriff of Livingston County, appellee, whose place of business is at Dana, in LaSalle County, took possession of the tractor and the cultivator, under the conditional sales note, and sold the tractor to another person. They also took some other chattels and some corn belonging to Wilhelm.

Appellant brought suit against appellees in the circuit court of LaSalle County to recover damages for the alleged wrongful conversion of the tractor, the cultivator and the corn, claiming a superior lien by virtue of the alias execution. It developed that all the property taken, except the tractor and the cultivator, was taken under a chattel mortgage recorded in Livingston County, and the controversy here concerns only the tractor and the cultivator. On the hearing, the court entered a judgment in favor of appellees, and the cause is here on appeal from that judgment.

The grounds urged for reversal are, that appellees unreasonably delayed in repossessing the property under the conditional sales note, and that by reason thereof appellant's execution was a superior lien and that appellant did not purchase the note, but paid it for Wilhelm, as his agent, and that thereby it was cancelled and the transfer to appellees carried with it no ~~right of~~ lien.

Appellant recovered a judgment by confession in the circuit court of Livingston County against W. H. Wilhelm on July 20, 1938, for \$568.21, on another indebtedness not connected with the above transaction. Execution on the judgment was issued and delivered to the sheriff of that county on the same day, and was returned unsatisfied on October 18, 1938. A alias execution was issued and delivered to the sheriff on the next day, and was returned in no part satisfied on January 17, 1939. During the month of December, 1938, while the alias execution was in the hands of the sheriff of Livingston County, appellant, whose place of business is at Dan, in Lapeere County, took possession of the tractor and the cultivator, under the conditional sales note, and sold the tractor to another person. They also took some other chattels and some corn belonging to Wilhelm.

Appellant brought suit against appellees in the circuit court of Lapeere County to recover damages for the alleged wrongful conversion of the tractor, the cultivator and the corn, claiming a superior lien by virtue of the alias execution. It developed that all the property taken, except the tractor and the cultivator, was taken under a chattel mortgage recorded in Livingston County, and the controversy here concerns only the tractor and the cultivator. On the hearing, the court entered a judgment in favor of appellees, and the cause is here on appeal from that judgment.

The grounds urged for reversal are, that appellees wrongfully delayed in repossessing the property under the conditional sales note, and that by reason thereof appellant's execution was a superior lien and that appellant did not purchase the note, but paid it for Wilhelm, as his agent, and that thereby it was encumbered and the tractor to appellees carried with it no superior lien.

In *Haines v. Doss*, 269 Ill. App. 179, relied upon by appellant, it was held that if there is an unreasonable delay in asserting the vendor's rights under a conditional sales contract after the final payment is due, the lien provided thereby will expire as to subsequent purchasers and judgment creditors. In that case the property was seized on execution, and there was a trial of the right of property between the execution creditor and the conditional vendor. The question was as to the priority of the two liens. Appellant claims that the same issue is involved here. The difficulty with his claim is that there is neither allegation nor proof of any fact that tends to show that his execution was ever a lien on the property, either at the time appellees took possession thereof or at any other time. It is true that the conditional sales note of April 1, 1936, names the "Post Office" of Wilhelm as "Ancona, Ill.", which is in Livingston County, and appellees' answer to the complaint alleges the chattel mortgage was recorded in that county on December 13, 1937, and appellant testified that Wilhelm lived in Livingston County "at one time", yet even if it be assumed that Wilhelm lived in Livingston County when the note was made and when the chattel mortgage was recorded, it is not alleged or shown that he lived there at any time while the execution was in the hands of the sheriff of that county, or that the tractor or the cultivator was then, or at any other time, in Livingston County.

An execution in the hands of an officer becomes a lien on only such personal property of the execution debtor as is within the county where the execution is issued. (*Pike v. Baker*, 53 Ill. 163, 166; *Haugens v. Holmes*, 314 Ill. App. 166, 170.) Unless the property was in Livingston County while the alias execution was in the hands of the sheriff of that county, the execution was not a lien thereon.

In *Haines v. Doas*, 269 Ill. App. 170, relied upon by appellant, it was held that if there is an unreasonable delay in asserting the vendor's rights under a conditional sales contract after the final payment is due, the lien provided thereby will expire as to subsequent purchasers and judgment creditors. In that case the property was seized on execution, and there was a trial of the right of property between the execution creditor and the conditional vendor. The question was as to the priority of the two liens. Appellant claims that the same issue is involved here. The difficulty with his claim is that there is neither allegation nor proof of any fact tending to show that his execution was ever a lien on the property, either at the time appellees took possession thereof or at any other time. It is true that the conditional sales note of April 1, 1936, names the "Post Office" of Winfield as "Assignee-III", which is in Livingston County, and appellees' answer to the complaint alleges the chattel mortgage was recorded in that county on December 15, 1937, and appellant testified that Winfield lived in Livingston County "at one time", yet even if it be assumed that Winfield lived in Livingston County when the note was made and when the chattel mortgage was recorded, it is not alleged or shown that he lived there at any time while the execution was in the hands of the sheriff of that county, or that the executor of the will was there, or at any other time, in Livingston County.

An execution in the hands of an officer becomes a lien on only such personal property of the execution debtor as is within the county where the execution is issued. (*Wise v. Baker*, 33 Ill. 183, 186; *Hargens v. Holmes*, 334 Ill. App. 166, 170.) Unless the property was in Livingston County while the alias execution was in the hands of the sheriff of that county, the execution was not a lien thereon.

Without making any proof of such a lien, appellant is in no position to invoke the doctrine of superiority, but merely stands in the same place as any other unsecured creditor of Wilhelm.

Appellant also relies upon *Provus Bros. Inc. v. Sjolander*, 273 Ill. App. 374. In that case the conditional vendor of certain beds delivered them to a building corporation for use in the building, but the conditional sales contracts were made with the president of the corporation, and upon a partial payment, the conditional vendor executed what purported to be a waiver of all claims on account of labor and materials furnished to the building, thereby enabling the building corporation, whose president executed an affidavit that there were no unpaid outstanding claims, to commit a fraud on the purchasers of the building and equipment, as free from claims. There was evidence tending to show the conditional vendor had actual knowledge of the sale, and it was held that it was precluded from enforcing its conditional sales contracts against the vendee's bona fide purchasers, after a delay of three years before asserting its claim, and permitting such bona fide purchasers to meanwhile believe they had bought the beds with the building. There, the innocent purchasers of the beds, relying upon representations that there was no lien on the beds, acquired the property for a valuable consideration and had been in possession for three years. In the case at bar, there is no testimony which tends to show that appellant's judgment was based upon a credit extended to Wilhelm on any representation by anybody or any supposition on his part that the conditional sales note was paid. Neither of the cases relied upon by appellant are persuasive here. So far as the record discloses, he was merely an unsecured

Without making any proof of such a lien, appellant is in no position to invoke the doctrine of superiority, but merely stands in the same place as any other unsecured creditor of

Wilhelm.

Appellant also relies upon *Prosser Bros. Inc. v. Bjorkman*,

278 Ill. App. 374. In that case the conditional vendor of certain beds delivered them to a building corporation for use in the building, but the conditional sales contracts were made with the president of the corporation, and upon a partial payment, the conditional vendor asserted what purported to be a waiver of all claims on account of labor and material furnished to the building, thereby enabling the building corporation, whose president executed an affidavit that there were no unpaid or standing claims, to commit a fraud on the purchasers of the building and equipment. There was evidence tending to show the conditional vendor had actual knowledge of the sale, and it was held that it was precluded from enforcing its conditional sales contracts against the vendee's bona fide purchasers, after a delay of three years before asserting its claim, and permitting such bona fide purchasers to meanwhile believe they had bought the beds with the building. There, the innocent purchasers of the beds, relying upon representations that there was no lien on the beds, required the property for a valuable consideration and had been in possession for three years. In the case at bar, there is no testimony which tends to show that appellant's judgment was based upon a credit extended to Wilhelm on any representation by anybody or any application on his part that the conditional sales note was paid. Neither of the cases relied upon by appellant are persuasive here. So far as the record discloses, he was merely an unsecured

creditor of Wilhelm, without ever having had any lien of any kind on the property. The conditional sales note was still valid as between appellees and Wilhelm when they repossessed the property, and as the record does not show that appellant was entitled to any lien therein, the repossession was not a conversion of which he can complain.

Furthermore, while the record shows that the tractor and the cultivator were not repossessed by appellees for almost a year after the last installment of the conditional sales note was due, it also shows that appellant's executions were in the hands of the sheriff for 133 days, or almost four and one half months, before December 1, 1938, and in addition thereto, during the time in December prior to the day, not shown in the evidence, when appellees took possession of the property. It is not shown that appellant made any effort during that time to have a levy made, or to ascertain whether Wilhelm or the property was in Livingston County or in some other county. If the property was in another county, he could have had an execution sent to that county, (Ill. Rev. Stat. 1941, chap. 77, par. 4), or he could have filed a transcript of his judgment there and had an execution issued thereon, under section 1 of the same statute. (Haugens v. Holmes, supra.) It has long been settled that where two persons have chattel mortgages on the same property, and they both permit the property to remain in the hands of the mortgagor an unreasonable length of time after the maturity of their respective mortgages, the one first acquiring possession of the property is entitled to priority of lien, without reference to the date of his mortgage. (Atkins v. Byrnes, 71 Ill. 326, 331; Constant

creditor of Wilhelm, without ever having had any lien of any kind on the property. The conditional sales note was still valid as between appellees and Wilhelm when they repossessed the property, and as the record does not show that appellant was entitled to any lien therein, the repossession was not a conversion of which he can complain.

Furthermore, while the record shows that the tractor and the cultivation were not repossessed by appellees for almost a year after the last installment of the conditional sales note was due, it also shows that appellant's executions were in the hands of the sheriff for 133 days, or almost four and one half months, before December 1, 1938, and in addition thereto, during the time in December prior to the day, not shown in the evidence, when appellees took possession of the property. It is not shown that appellant made any effort during that time to have a levy made, or to ascertain whether Wilhelm or the property was in Livingston County or in some other county. If the property was in another county, he could have had an execution sent to that county, (Ill. Rev. Stat. 1941, chap. 72, par. 4), or he could have filed a transcript of his judgment there and had an execution issued thereon, under Section 1 of the same statute. (Hoffman v. Holmes, supra.) It has long been settled that where two persons have joint and several mortgages on the same property, and they both permit the property to remain in the hands of the mortgagor in unreasonable length of time after the maturity of their respective mortgages, the one first acquiring possession of the property is entitled to priority of lien, without reference to the date of his mortgage. (Atkins v. Symmes, 71 Ill. 396, 387; Constant

v. Matteson, 22 id. 546, 558.) The same doctrine manifestly applies to other types of lien. Under those decisions, appellant would not be entitled to priority, even if his execution had been a lien.

Under the claim that appellees did not purchase the note, but paid it for Wilhelm, appellant quotes the following question and answer in the cross-examination of appellee's manager: Q. "You bought that note on the instructions of the Dana Grain Company?" A. "That's right. Mr. Wilhelm asked us to pay it." The further cross-examination of the witness shows the following questions and answers: Q. "When you went through the transaction of buying this note you called them up (the bank) on the phone?" A. "That is right." Q. "You told them you wanted to buy this note?" A. "That's right. I think they held it for collection." On redirect examination the witness testified: "We did not take possession of the tractor until after we bought the note. It was in December after we bought the note that we took possession of it." The testimony further shows that the bank charged appellee's account with the cashier's check issued by the bank to the International Harvester Company for the amount of the purchase price of the note, \$205.15, and that appellees sold the tractor for \$500.00 and retained the entire proceeds of the sale. The answer to appellant's claim that appellees "could" have had a book account against Wilhelm for the money paid for the note is that there is no testimony which tends to show there was any such account. The testimony falls far short of showing that appellees paid the note as Wilhelm's agent, but on the contrary shows that they purchased it on their own account.

The judgment of the circuit court is affirmed.

Judgment affirmed.

v. Peterson, 12 id. 543, 556.) The same doctrine manifestly applies to other types of lien. Under those sections, appellant would not be entitled to priority, even if his execution had been a lien.

Under the view that appellee did not purchase the note, but paid it for Wilheim, appellant quotes the following question and answer in the cross-examination of appellee's manager: Q. "When bought that note on the instructions of the Dana Loan Company?" A. "That's right. Mr. Wilheim asked us to pay it." The further cross-examination of the witness raises the following questions and answers: Q. "When you went through the transaction of buying this note you called them up (the bank) on the phone?" A. "That is right." Q. "You told them you wanted to buy this note?" A. "That's right." I think they held it for collection." On re-direct examination the witness testified: "We did not have collection of the note until after we bought the note. It was in fact after we bought the note that we took possession of it." The testimony further shows that the bank charged appellee's account with the banker's check issued by the bank to the International Business Company for the amount of the purchase price of the note, \$250.00, and that appellee sold the note for \$250.00 and retained the entire proceeds of the sale. The answer to appellant's claim that appellee "bought" the note is not against Wilheim for the money paid for the note is that there is no testimony which tends to show there was any such purchase. The testimony is to the effect of showing that appellee paid the note to Wilheim's agent, but on the contrary shows that they purchased it on their own account.

The judgment of the circuit court is affirmed.

Judgment affirmed.

OK
draft

Abstract 318 I.A. 646¹

GENERAL NO. 9866

AGENDA NO. 17

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FEBRUARY TERM, 1943

NORRIS GRAIN COMPANY,
a corporation,

Appellee

vs.

WILLIAM R. BROWN and
A. G. MILLER
(William R. Brown),

Appellant

APPEAL FROM
CIRCUIT COURT OF
PUTNAM COUNTY.

83
593

DOVE, J.:

Appellee filed a suit in the circuit court of Putnam County, as an interpleader, to determine the respective rights of William R. Brown and his farm tenant, A. G. Miller, in \$656.04, ~~as~~ the proceeds of certain grain sold to appellee. *The complaint alleged that* ~~alleging~~ Brown claims all of such proceeds and that Miller claims one half thereof, and that each of them had threatened to sue appellee on their respective claims. The original complaint offered to bring the money into court, subject to the order thereof, and prayed an injunction restraining the defendants from commencing any suit against the plaintiff in connection therewith. The complaint was later amended by alleging that Brown had commenced an action at law against the plaintiff in the municipal court of Chicago to recover the purchase money for the grain mentioned, and the proceeds of other grain sold by Miller as tenant of the Brown farm. An injunction, restraining Brown from proceeding with the suit

40
04

Abstract 3181 A. 646

AGENDA NO. 17

GENERAL NO. 9866

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

TERMINAL TERM, 1943

APPEAL FROM
CIRCUIT COURT OF
PUTNAM COUNTY.

NORMIS GRAIN COMPANY,
a corporation,
Appellee
vs.
WILLIAM R. BROWN and
A. G. MILLER
(William R. Brown),
Appellant

DOVE, J. :

Appellee filed a suit in the circuit court of Putnam County, an interpleader, to determine the respective rights of William R. Brown and his farm tenant, A. G. Miller, in 668.04, as the proceeds of certain grain sold to appellee. *The complaint alleged that* ~~William R. Brown~~ Brown claims all of such proceeds and that Miller claims one half thereof, and that each of them had threatened to sue appellee on their respective claims. The original complaint offered to bring the money into court, subject to the order thereof, and prayed an injunction restraining the defendants from commencing any suit against the plaintiff in connection therewith. The complaint was later amended by alleging that Brown had commenced an action at law against the plaintiff in the municipal court of Chicago to recover the purchase money for the grain mentioned, and the proceeds of other grain sold by Miller as tenant of the Brown farm. An injunction, restraining Brown from proceeding with the suit

in the municipal court, and restraining Miller from commencing any proceeding against appellee was prayed, and a temporary injunction was issued in accordance with the prayer of the amended complaint. Brown filed a written motion to dissolve the injunction. On the hearing the court denied the motion and Brown has appealed to this court.

The appeal is predicated on the following provisions of section 78 of the Civil Practice Act (Ill. Rev. Stat. 1941, chap. 110, par. 202):

"Whenever an interlocutory order or decree is entered granting an injunction or overruling a motion to dissolve the same * * * an appeal may be taken therefrom to the Appellate Court. * * * The party taking such appeal shall give bond, to be approved by the clerk or the judge of the court below, to secure costs in the Appellate Court. Upon the filing of the record in the Appellate Court the same shall there be at once docketed, and shall be ready for hearing under the rules of said court, taking precedence of other cases in said court. No notice of appeal need be filed in perfecting an appeal under this section."

Several grounds are urged for reversal. We are met at the threshold of the case with appellee's contention that there is no appealable order before the court, and that therefore the appeal should be dismissed. The abstract and the record show only the minutes of the judge's docket, reading: "Motion of Wm. R. Brown to dissolve temporary injunction. Leave to defendant A.G. Miller to file answer instanter. Motion of Wm. R. Brown to dismiss complaint as amended. Motions denied." If there was any order or decree entered it does not appear in the record.

It is to be noticed that section 78 makes no provision for an appeal except "whenever an interlocutory order or decree is entered." This is the only statutory provision for appeals from interlocutory orders. It is a familiar rule that the right to an appeal is strictly statutory. (Murray v. Hagmann, 315 Ill. 437, 440.) Under that principle, and the limitations of section 78, it follows that the entry of an order or decree is prerequisite to the right to appeal. The minutes

in the municipal court, and restraining Miller from commencing any proceeding against appellee was prayed, and a temporary injunction was issued in accordance with the prayer of the amended complaint. Brown filed a written motion to dissolve the injunction. On the hearing the court denied the motion and Brown has appealed to this court.

The appeal is predicated on the following provisions of section 78 of the Civil Practice Act (Ill. Rev. Stat. 1941, chap. 110, par. 78):

"Whenever an interlocutory order or decree is entered granting an injunction or overruling a motion to dissolve the same * * * an appeal may be taken therefrom to the Appellate Court. * * * The party taking such appeal shall give bond, to be approved by the clerk or the judge of the court below, to secure costs in the Appellate Court. Upon the filing of the record in the Appellate Court the same shall there be set on a docket and shall be ready for hearing under the rules of said court, taking precedence of other cases in said court. No notice of appeal need be filed in perfecting an appeal under this section."

Several grounds are urged for reversal. It was met at the threshold of the case with appellee's contention that there is no appealable order before the court, and that therefore the appeal should be dismissed. The abstract and the record show only the minutes of the judge's docket, reading: "Motion of W. H. Brown to dissolve temporary injunction. Leave to defendant A. G. Miller to file answer interposed. Motion of W. H. Brown to dismiss complaint as amended. Motion denied." If there was any order or decree entered it does not appear in the record. It is to be noted that section 78 makes no provision for an appeal except "whenever an interlocutory order or decree is entered." This is the only statutory provision for appeals from interlocutory orders. It is familiar rule that the right to an appeal is strictly statutory. (Harris v. Haggard, 315 Ill. 437, 440.) Under that principle, and the limitations of section 78, it follows that the entry of an order or decree is prerequisite to the right to appeal. The minutes

of the judge's docket are no part of the record. (Sattler v. People, 59 Ill. 68; McCormick v. Wheeler, 36 id. 114.) In the McCormick case, where the minutes of the trial judge upon his docket showed the allowance of a motion to vacate a judgment, but no entry of the order was made in the records of the court, the Supreme Court said in the opinion (p. 120): "For what is the judgment of a court? It does not reside, unspoken and unwritten, in the breast of the judge. It is not to be sought in the minutes or memoranda which the judge makes upon his own docket, and which the law does not require him to make, but which are merely kept by him for his own convenience, and to enable him to see that the clerk accurately makes up the record."

In City of Alton v. Heidrick, 248 Ill. 76, one of the grounds upon which an appeal in a special assessment proceeding was dismissed was, that the entry appealed from was "not a judgment at all" and was "apparently a mere memorandum of the judge, probably entered in his ~~own~~ docket as a memorandum from which a formal judgment might be written up." That is the situation in this case. People v. Mitchell, 325 Ill. 472, dismissing an appeal from an order of the county court overruling tax objections, but containing no final judgment and order of sale, is analagous.

Waggoner v. Saether, 267 Ill. 32, 40, relied upon by appellant, pertains to oral motions and orders in chancery cases, and how they may be made a part of the record, as distinguished from being made part of a certificate of evidence, and is not in point. In respect to the issue here, orders and decrees are manifestly in the same category as judgments.

Rule 31 of the Supreme Court and Rule 2 of this court, providing that "Appeal may be taken if the motion is denied, or if the court does not act thereon within seven days after its presentation", is also relied upon by appellant, under the claim that appellee's contention amounts to no more than that the court did not act on the motion to

of the judge's docket are no part of the record. (Satter v. People, 39 Ill. 68; McCormick v. Wheeler, 36 id. 114.) In the McCormick case, where the minutes of the trial judge upon his docket showed the allowance of a motion to vacate a judgment, but no entry of the order was made in the records of the court, the Supreme Court said in the opinion (p. 120): "For what is the judgment of a court? It does not reside, unspoken and unwritten, in the breast of the judge. It is not to be sought in the minutes or memoranda which the judge makes upon his own docket, and which the law does not require him to make, but which are merely kept by him for his own convenience, and to enable him to see that the clerk accurately makes up the record."

In City of Alton v. Heubrich, 248 Ill. 76, one of the grounds upon which an appeal in a special assessment proceeding was dismissed was that the entry appealed from was "not a judgment at all" and was "apparently a mere memorandum of the judge, probably entered in his docket as a memorandum from which a formal judgment might be written up." That is the situation in this case. People v. Mitchell, 395 Ill. 427, dismissing an appeal from an order of the county court overruling tax objections, but containing no final judgment and order of sale, is analogous.

People v. Satter, 257 Ill. 32, 40, relied upon by appellant, purports to overrule motions and orders in summary cases, and how they may be made a part of the record, as distinguished from being made part of a certificate of evidence, and is not in point. In respect to the issue here, orders and decrees are manifestly in the same category as judgments. Rule 31 of the Supreme Court and Rule 2 of this court, providing that "appeal may be taken if the motion is denied, or if the court does not act thereon within seven days after its presentation", is also relied upon by appellant, under the claim that appellee's contention amounts to no more than that the court did not act on the motion to

dissolve the injunction, and that, therefore, under the rule, the appeal lies. Appellee's contention cannot be so interpreted. Its claim is that no appealable order was entered by the court. The court acted on the motion, but, so far as the record shows, no order or decree was entered.

We might add however, that we have considered the contentions urged by appellant for reversal and even if a formal order denying the motion had been entered, we believe the chancellor was warranted in entering the minutes he did.

The appeal however will be dismissed and under the provisions of said Section 78, an attorney's fee of \$100.00 is allowed and ordered taxed against appellant as part of the costs of this appeal.

Appeal dismissed.

dissolve the injunction, and that, therefore, under the rule, the
appeal lies. Appellee's contention cannot be so interpreted. Its
claim is that no appealable order was entered by the court. The court
acted on the motion, but, so far as the record shows, no order or
decree was entered.

We might add however, that we have considered the contentions
urged by appellant for reversal and even if a formal order denying
the motion had been entered, we believe the chancellor was warranted
in entering the minutes he did.

The appeal however will be dismissed and under the provisions of
said Section 78, an attorney's fee of \$100.00 is allowed and ordered
taxed against appellant as part of the costs of this appeal.

Appeal dismissed.

*Admitted by
Ruffman*

Absolvent

GEN. NO. 9867

AGENDA NO. 18

IN THE 318 I.A. 646²
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

330

February Term, A. D. 1943

The Ohio National Life Insurance Company,
a corporation,

Plaintiff, Appellee and Cross-Appellant

-vs-

Board of Education of Grant Community High
School District No. 124 of Lake County, Illi-
nois; Arthur H. Franzen, as Treasurer of
Grant Community High School District No. 124
of Lake County, Illinois; Arthur G. Highgate,
Laddie Raska, William G. Nagle, William Ton-
yan and Charles Brainard, as Members of the
Board of Education of Grant Community High
School District No. 124 of Lake County, Illi-
nois, and Jay B. Morse as County Clerk of Lake
County, Illinois,

Defendants

Board of Education of Grant Community High
School District No. 124 of Lake County, Illi-
nois,

Counter-Claimant, Appellant, and Cross-
Appellee,

-vs-

The Ohio National Life Insurance Company, a
corporation, Unity of Bohemian Ladies, a cor-
poration, Leslie C. Small and May Small
Inglesh,

Counter-Defendants, Appellees

619
APPEAL FROM
CIRCUIT COURT OF
LAKE COUNTY.

Appellate

3181A.646

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A. D. 1943

The Ohio National Life Insurance Company,
a corporation,

Plaintiff, Appellee and Cross-Appellant

-vs-

Board of Education of Grant Community High
School District No. 124 of Lake County, Illi-
nois; Arthur M. Franzon, as Treasurer of
Grant Community High School District No. 124
of Lake County, Illinois; Arthur G. Hingate,
Ladies League, William G. Hagie, William Ton-
van and Charles H. Hingard, as Members of the
Board of Education of Grant Community High
School District No. 124 of Lake County, Illi-
nois, and Jay B. Morse as County Clerk of Lake
County, Illinois,

Defendants

Board of Education of Grant Community High
School District No. 124 of Lake County, Illi-
nois,

Counter-Claimant, Appellant, and Cross-
Appellee,

-vs-

The Ohio National Life Insurance Company, a
corporation, Harry of Corporation Ladies, a cor-
poration, Leslie G. Small and Jay Small
Indefinite,

Counter-Defendants, Appellants

ATTORNEY FOR
DISTRICT COURT OF
LAKE COUNTY.

Leslie C. Small and May Small Inglesh,
Counter-Claimants, Appellees and
Cross-Appellants,
and Unity of Bohemian Ladies, a corporation,
Counter-Claimants, Appellees,
-vs-

Board of Education of Grant Community High
School District No. 124 of Lake County,
Illinois; Arthur H. Franzen, as Treasurer
of Grant Community High School District No.
124 of Lake County, Illinois; Arthur G.
Highgate, Laddie Raska, William G. Nagle,
William Tonyan and Charles Brainard, as Members
of the Board of Education of Grant Community
High School District No. 124 of Lake County,
Illinois,

Counter-Defendants.

Board of Education of Grant Community High
School District No. 124 of Lake County,
Illinois,

Appellant and Cross-Appellee.

PER CURIAM:-

This cause is here on appeal from judgments of the circuit court of Lake County rendered against the Board of Education of Grant Community High School District No. 124 of that county, for \$32,440.50 in favor of The Ohio National Life Insurance Company, \$14,737.50 in favor of Leslie C. Small and May Small Inglesh, and \$5,895.00 in favor of Unity of Bohemian Ladies, a corporation. All the defendants except the corporation last named, have filed a cross appeal.

The suit grows out of a \$54,000.00 bond issue of the school district under date of March 1, 1931. This was preceded by another bond issue of \$72,000.00, pursuant to an election in December, 1929, on the propositions of building a school house, purchasing a site and issuing bonds to that amount. After ascertaining that the \$72,000.00 would not be sufficient to complete the building and equipment, and after the fund was exhausted by payments and contracts covering that

after the fund was exhausted by payments and contracts covering that would not be sufficient to complete the building and equipment, and leaving bonds to that amount. After ascertaining that the \$2,000.00 on the proposition of building a school house, purchasing a site and bond issue of \$2,000.00, pursuant to an election in December, 1929, district under date of April 1, 1931. This was provided by another The suit grows out of a \$4,000.00 bond issue of the school the corporation last named, have filed a cross appeal. Unity of Women's Ladies, a corporation. All the defendants except of Leslie G. Small and Ray Small Ingleish, and \$5,985.00 in favor of favor of The Ohio National Life Insurance Company, \$4,737.50 in favor of Grant Community High School District No. 124 of that county, for \$32,440.50 in of Lake County rendered against the Board of Education of Grant Community This cause is here on appeal from judgments of the circuit court PER CURIAM:-

Appellant and Cross-Appellee.

School District No. 124 of Lake County, Illinois, Board of Education of Grant Community High

Defendants-Respondents.

Illinois, High School District No. 124 of Lake County, of the Board of Education of Grant Community William Towner and Charles Brinkman, as and Harry Higginson, Madeline R. Smith, William G. Taylor, 124 of Lake County, Illinois; Arthur G. School District No. of Grant Community High School District No. Illinois; Arthur A. Freeman, as Treasurer, School District No. 124 of Lake County, Board of Education of Grant Community High

-vs-

Counter-Defendants, Appellees,

and Unity of Women's Ladies, a corporation,

Counter-Defendants, Appellees and Cross-Defendants,

Leslie G. Small and Ray Small Ingleish,

amount, the board of education let contracts for extras in excess of \$53,000.00 and by so doing the statutory limit of two and one-half per cent was exceeded. The \$54,000.00 bonds, due serially from September 1, 1941 to September 1, 1950, bearing interest at five and one-half per cent per annum, were then issued, without submitting the proposition to the voters of the district, and the proceeds were used to pay the claims for these extras. A resolution, adopting a schedule of annual tax levies for the payment of the principal and interest of the bonds, was passed and filed with the county clerk.

All the \$54,000.00 bonds are owned by appellees in separate holdings in proportion to the aggregate amounts of the judgments. The suit was instituted by the Ohio National Insurance Company in November, 1941. The first two counts of the complaint respectively pray that a writ of mandamus issue compelling the members of the school board and the treasurer to pay the accrued interest for 1940 and 1941, out of moneys levied, collected and on hand for that purpose, and that a like writ issue compelling the county clerk to extend taxes for the year 1941 in accordance with the levy resolution. The first count also alleges the recovery of a judgment of \$3025.00 by the plaintiff against the defendant in the United States District Court for the Northern District of Illinois, on June 30, 1936, for interest on the bonds held by it, and that the judgment was paid by appellant and is res adjudicata. The third count prays an injunction restraining the members of the school board and the treasurer from expending the money so on hand for any other purpose. The fourth count alleges repudiation by appellant of the obligation of the bonds and the acceleration of their maturity by virtue thereof. The fifth count is for money had and received, and the sixth count is for equitable subrogation to the rights of the persons and corporations furnishing extras, to pay for which the bonds were issued.

amount, the board of education let contracts for extras in excess of \$25,000.00 and by so doing the statutory limit of two and one-half per cent was exceeded. The \$25,000.00 bonds, due serially from September 1, 1941 to September 1, 1950, bearing interest at five and one-half per cent per annum, were then issued, without submitting the proposition to the voters of the district, and the proceeds were used to pay the claims for these extras. A resolution, adopting a schedule of annual tax levies for the payment of the principal and interest of the bonds, was passed and filed with the county clerk.

All the \$25,000.00 bonds are owned by appellees in separate holdings in proportion to the aggregate amounts of the judgments. The suit was instituted by the Ohio National Insurance Company in November, 1941. The first two counts of the complaint respectively pray that a writ of mandamus issue compelling the members of the school board and the treasurer to pay the accrued interest for 1940 and 1941, out of moneys levied, collected and on hand for that purpose, and that a like writ issue compelling the county clerk to extend taxes for the year 1941 in accordance with the levy resolution. The first count also alleges the recovery of a judgment of \$2025.00 by the plaintiff against the defendant in the United States District Court for the Northern District of Illinois, on June 3, 1938, for interest on the bonds held by it, and that the judgment was paid by appellant and is now adjudicated. The third count prays an injunction restraining the members of the school board and the treasurer from expending the money so on hand for any other purpose. The fourth count alleges repudiation by appellant of the obligation of the bonds and the acceleration of their maturity by virtue thereof. The fifth count is for money had and received, and the sixth count is for equitable subrogation to the rights of the persons and corporations furnishing extras, to pay for which the bonds were issued.

Appellant filed a counter claim to recover interest there-
tofore paid on the bonds up to September 1, 1939, making the
other appellees additional defendants thereto, and the added counter
defendants also filed counter claims similar to the original com-
plaint. Answers to the complaint, and to the several counter claims,
and replies to the answers were filed. The issues thus made were
submitted to the court, without a jury and upon the trial, the court
held that under prior decisions of the Supreme Court the bonds them-
selves were illegal and there could be no recovery thereon and dis-
missed the first three counts of the complaint and the counter claim
of appellant, and entered judgment as hereinbefore set out, requir-
ing appellees to deposit their bonds with the clerk of the court, to
be cancelled and returned to appellant upon payment and satisfaction
of the judgment.

A motion in this court by appellees and cross-appellants to trans-
fer this cause to the Supreme Court on the ground that the validity of
a statute is involved was taken with the case. In their brief counsel
for appellant states that on one or more of the counts for money had
and received and for equitable subrogation, and upon the fourth count
for anticipatory breach, the court found appellant indebted to the
respective appellees in the several amounts of the judgment, and arrived
at the amounts of recovery by finding that appellant is indebted for
the amounts of the bonds, and interest at the rate of five per cent per
annum from their date to March 1, 1940, when appellant repudiated the
obligation to exchange the taxes collected for that purpose for the
interest coupons, and deducted the amount of the first seventeen coupons.
Five per cent is the statutory rate for vexatious delay in payment, as
contrasted with the rate of five and one half per cent called for by the
bonds.

Appellant's answer denies the judgment of the United States Dist-
rict Court in res adjudicata, and invokes the decisions of the Supreme
Court of this State in the Orvis cases as a defense, and takes the same

Appellant filed a counter claim to recover interest there-

before paid on the bonds up to September 1, 1932, making the other appellees additional defendants thereto, and the added counter-
defendants also filed counter claims similar to the original com-
plaint. Answers to the complaint, and to the several counter claims, and replies to the answers were filed. The issues thus made were submitted to the court, without a jury and upon the trial, the court held that under prior decisions of the Supreme Court the bonds themselves were illegal, and there could be no recovery thereon and dismissed the first three counts of the complaint and the counter claim of appellant, and entered judgment as heretofore set out, requiring appellees to deposit their bonds with the clerk of the court, to be cancelled and returned to appellant upon payment and satisfaction of the judgment.

A motion in this court by appellees and cross-appellants to transfer this case to the Supreme Court on the ground that the validity of a statute is involved was taken with the case. In their brief counsel for appellant states that on one or more of the counts for money had and received and for equitable subrogation, and upon the fourth count for anticipatory breach, the court found appellant indebted to the respective appellees in the several amounts of the judgment, and arrived at the amounts of recovery by finding that appellant is indebted for the amounts of the bonds, and in interest at the rate of five per cent per annum from their date to March 1, 1940, when appellant requested the obligation to exchange the taxes collected for that purpose for the interest coupons, and deducted the amount of the first seventeen coupons. Five per cent is the statutory rate for vexatious delay in payment, as contrasted with the rate of five and one half per cent called for by the bonds.

Appellant's answer denies the judgment of the United States District Court in res adjudicata, and invokes the decision of the Supreme Court of this State in the Ortiz case as a defense, and takes the same

position on this appeal. In the first Orvis case, (People v. Orvis, 358 Ill. 408), the objections of a tax payer to the 1932 tax levy on account of these bonds were upheld on the ground that the act of April 30, 1931 (Ill. Rev. Stat. 1941, chap. 122, par. 406s), under which the People claimed the bonds were issued, was inapplicable, because it did not, by its authorization to issue bonds in excess of the two and one-half per cent limitation "for any purpose now authorized by law", authorize such an issue to pay claims in excess of the statutory limitation, but merely removed such limitation, in cases coming within its terms, as to bonds issued after the passage of the act, pursuant to antecedent proceedings, and did not authorize the issue of bonds without a vote of the electorate. The validating act of 1933 (Cahill's Stat. 1933, chap. 122, par. 446 (13), was also held inapplicable, because it provided only for the issue of bonds "for the purpose of funding and paying legal claims."

After the decision in the first Orvis case, another validating act was passed in 1935, (Ill. Rev. Stat. 1937, chap. 122, par. 406y), which the Supreme Court held invalid in the second Orvis case (People v. Orvis, 374 Ill. 536), as an attempt to validate claims theretofore held by the first Orvis case to be invalid. This case was also decided on the objections in 1939, of the same tax payer to taxes levied on account of the same bonds. The court also held in that case that on account of the limitations of the Federal Judiciary act, (1 Stat. at Large 92, chap. 20, sec. 34; Rev. Stat. sec. 721; U.S.C.A., title 28, sec. 725), the judgment of the United States Circuit Court was not controlling.

The reply to appellant's answer to the complaint denies that the Orvis cases are binding on the insurance company, because it was not a party to either of those actions, and denies that those decisions are a bar to its cause of action and alleges that the Supreme Court failed

position on this appeal. In the first *Orvis* case, (*People v. Orvis*, 358 Ill. 408), the objections of a tax payer to the 1932 tax levy on account of these bonds were upheld on the ground that the act of April 30, 1931 (Ill. Rev. Stat. 1941, ch. 122, par. 408a), under which the People claimed the bonds were issued, was unconstitutional, because it did not, by its authorization to issue bonds in excess of the two and one-half per cent limitation "for any purpose not authorized by law", authorize such an issue to pay claims in excess of the statutory limitation, but merely removed such limitation, in cases coming within its terms, as to bonds issued after the passage of the act, pursuant to antecedent proceedings, and did not authorize the issue of bonds without a vote of the electorate. The validating act of 1933 (*Genill's Stat. 1933*, chap. 122, par. 408 (1)), was also held inapplicable, because it provided only for the issue of bonds "for the purpose of financing and paying legal claims."

After the decision in the first *Orvis* case, another validating act was passed in 1935, (Ill. Rev. Stat. 1937, ch. 122, par. 408b), which the Supreme Court held invalid in the second *Orvis* case (*People v. Orvis*, 374 Ill. 535), as an attempt to validate claims theretofore held by the first *Orvis* case to be invalid. This case was also decided on the objections in 1935, of the same tax payer to taxes levied on account of the same bonds. The court also held in that case that on account of the limitations of the Federal Judiciary act (1 Stat. at L. 92, chap. 20, sec. 34; Rev. Stat. sec. 521; U.S.C.A., title 28, sec. 752), the judgment of the United States Circuit Court was not controlling. The reply to appellant's answer to his complaint denies that the *Orvis* cases are binding on the insurance company, because it was not a party to either of those actions, and denies that those decisions are a bar to its cause of action and alleges that the Supreme Court will

to give faith and credit to the judgment entered in the United States District Court, in violation of Revised Statutes 905, 28 U.S.C.A. 687, requiring that judgments of the Federal courts in a state shall have the same dignity in the courts of that state as those of its own courts.

It was stipulated between the parties that either side might offer proofs of any fact or facts materially relevant, and might insist on any claim or defense that was brought to the attention of the court, the same as though it were pleaded.

The notice of cross-appeal embraces the following points: The court should find the bonds issued are valid and subsisting obligations of the school district and should have entered judgment on the interest coupons as prayed in the complaint; the writ of mandamus prayed against the county clerk, and the injunction prayed should be issued; the judgment of the United States District Court is res adjudicata, and interest should have been allowed to the date of the judgment.

The motion to transfer the cause alleges as grounds therefor, that this cause involves in the first instance, the validity of the bonds which were attempted to be validated by the act of 1935, and that the validity of the ^{bonds} ~~act~~ depends, under at least one theory, upon the validity of that act; that while the act of 1935 was held invalid in the tax objection suits, that decision is not binding on the bondholders who are now for the first time before the court; that they are entitled to have the validity of the 1935 act determined de novo; and that therefore there is involved a question of the validity of a statute.

The motion and brief of appellees and cross-appellants cite and rely upon People v. Chicago, Burlington and Quincy Railroad Co., 247 Ill. 340, 345; People v. Chicago and Alton Railroad Company, 247 id. 373; People v. Illinois Central Railroad Co., 298 id. 516, 521; Town

to give 10th and credit to the judgment entered in the United States District Court, in violation of Revised Statutes 903, 904, U.S.C.A. 587, requiring that judgments of the Federal courts in a state shall have the same dignity in the courts of that state as those of its own courts.

It was stipulated between the parties that either side might offer proofs of any fact or issue materially relevant, and might insist on any claim or defense that was brought to the attention of the court, the same as though it were pleaded.

The notice of cross-appeal enforces the following point: The court should find the bonds issued are valid and subsisting obligations of the school district and should have entered judgment on the interest coupons as prayed in the complaint; the writ of mandamus prayed against the county clerk, and the injunction prayed should be issued; the judgment of the United States District Court is reversed, and interest should have been added to the date of the judgment.

The motion to transfer the cause alleges as grounds therefor, that this cause involves in the first instance, the validity of the bonds which were attempted to be validated by the act of 1895, and that the validity of the ^{bonds} ~~landmarks~~, under at least one theory, upon the validity of that act; that while the act of 1895 was held invalid in the tax objection suits, that decision is not binding on the bondholders who are now for the first time before the court; that they are entitled to have the validity of the 1895 act determined as now; and that therefore there is involved a question of the validity of a statute.

The motion and brief of appellees and cross-appellants cite and rely upon People v. Chicago, Burlington and Quincy Railroad Co., 111 Ill. 340, 345; People v. Chicago and Alton Railroad Company, 247 Ill. 373; People v. Illinois Central Railroad Co., 235 Ill. 323, 324; Town

of Lyons v. Cooleage, 89 id. 529; Worley v. Idleman, 285 id. 214, 221; and the note following the case of Lee v. Independent School District (149 Iowa, 345) as reported in 37 L.R.A. (N.S.) 383. In People v. Chicago, Burlington and Quincy Railroad Co., supra, at page 345 it is held: "Where a right is asserted against a municipality and a judgment is recovered it is binding on tax-payers although they are required as individuals, to pay the judgment, but a decree enjoining the collection of a tax to pay a demand against a town in a suit by tax-payers against the town is not res adjudicata against the holder of the demand who is not a party to the suit. (Town of Lyons v. Cooleage, 89 Ill. 529.) The interest of the holder of the demand is adverse to that of the town and the tax-payers, and he is not represented by either of them in a litigation between them. This case does not come within any recognized rule of representation of one not a party to the record."

In the recent case of Alward v. Borah, 381 Ill. 134 the court quoted from the early case of Botsford v. O'Conner, 57 Ill. 72 at page 76 where it is said: "It is a principle that lies at the foundation of all jurisprudence in civilized countries, that a person must have an opportunity ^{of being} ~~to be~~ heard before a court can deprive such person of his rights. To proceed upon any other rule, would shock the sense of justice entertained by mankind, would work great wrong and injustice, and render the administration of justice a mere form. Until a person is made a party to a suit, and is afforded a reasonable opportunity of being heard in defense of his rights, a court has no power to divest him of a vested right." This rule has been re-affirmed many times. Leininger v. Reichle, 317 Ill. 625; Heppe v. Szczepanski, 209 id. 98.

Cross-appellants insist that since the Orvis cases are not binding on the bondholders, the validating act of 1935 must, for the purposes of this suit, be presumed to be valid. In our opinion the record discloses that the question of the validity of the validating act of 1935, so far as the bondholders are concerned, was definitely raised and in issue in the trial court, and ruled upon by the trial court, and is also raised by the notice of cross-appeal and the brief of cross-appellants. This is sufficient to confer jurisdiction upon the Supreme Court on direct appeal. Hackner v. VanWyck, 381 Ill. 622.

of Lyons v. Goodbody, 89 Ill. 689; Wiley v. Williams, 288 Ill. 214, 221; and the note following the case of Lee v. Independent School District (1st Iowa, 345) as reported in 57 Ill. 283. In

People v. Chicago, Burlington and Quincy Railroad Co., supra, at

page 345 it is held: "Where a right is asserted against a municipality and a judgment is recovered it is binding on tax-payers although they are treated as individuals, to pay the judgment, but a decree enjoining the collection of a tax to pay a demand against a town in a suit by tax-payers against the town is not res adjudicata against the holder of the demand who is not a party to the suit. (Town of Lyons v. Goodbody, 89 Ill. 689.) The interest of the holder of the demand is adverse to that of the town and the tax-payers, and he is not represented by either of them in a litigation between them. This case does not come within any recognized rule of representation of one not a party to the record."

In the recent case of Alward v. Board, 281 Ill. 154 the court

quoted from the early case of Bedford v. Board, 51 Ill. 72 at

page 78 where it is said: "It is a principle that lies at the

foundation of all jurisprudence in civilized countries, that a person

shall have an opportunity to be heard before a court can deprive such

person of his rights. To proceed upon any other rule, would shock the

sense of justice sustained by mankind, would work great wrong and

injustice, and render the administration of justice a mere form. Until

a person is made a party to a suit, and is afforded a reasonable opportunity

of being heard in defense of his rights, a court has no power

to divest him of a vested right." This rule has been reaffirmed many

times. Jennings v. Nichols, 217 Ill. 828; People v. Board of Education, 209 Ill.

38.

Gross-Oppliger insists that since the civil case was not binding

on the board of education, the validity of its action, for the purposes

of this suit, be presumed to be valid. In our opinion the record

discloses that the question of the validity of the validation of

1935, so far as the conditions are concerned, was definitely settled

and is in the trial court, and ruled upon by the trial court,

and is also raised by the notice of cross-examination and the brief of cross-

examination. This is sufficient to confer jurisdiction upon the court

Court on direct appeal. Becker v. Vanhook, 281 Ill. 623.

It also appears from the record that none of the bondholders was a party to either of the Orvis cases. Under the cases cited the bondholders are entitled to their day in court on this question. The motion to transfer is allowed, and the cause is transferred to the Supreme Court.

Cause transferred.

